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THE LATE JOHN PICKERING.

It was the remark of Lord Brougham, illustrated by his own crowded life, that the complete performance of all the duties of an active member of the British parliament might be joined with a full practice at the bar. The career of the late Mr. Pickering illustrates a more grateful truth: that the mastery of the law as a science, and the constant performance of all the duties of a practitioner, are not incompatible with the studies of the most various scholarship, — that the lawyer and the scholar may be *one*. He dignified the law by the successful cultivation of letters, and strengthened the influence of these elegant pursuits by becoming their representative in the concerns of daily life, and in the common places of his profession. And now, that this living example of excellence is withdrawn from our personal regard, we feel a sorrow which words can only faintly express. Let us devote a few moments to the contemplation of what he did, and what he was. The language of exaggeration is forbidden by the modesty of his nature, as it is rendered unnecessary by the multitude of his virtues.

John Pickering, whose recent death we now deplore, was born in Salem, February 17th, 1777, at the period of the darkest despondency of the revolution. His father, Col. Pickering, was a

man of distinguished character, and an eminent actor in public affairs, whose name is one of the household words of our history. Of his large family of ten children John was the eldest.[1] His diligence at school was a source of early gratification to his friends, and gave augury of future accomplishments. An authentic token of this character, higher than any tradition of partial friends, is afforded by a little book, entitled "Letters to a Student in the University of Cambridge, Mass., by John Clarke, Minister of a Church in Boston," printed in 1796; which were in reality addressed to him. The first letter begins with an honorable allusion to his early improvement. "Your superior qualifications for admission into the University give you singular advantages for the prosecution of your studies. . . . You are now placed in a situation to become, what you have often assured me is your ambition, *a youth of learning and virtue.*" The last letter of the volume concludes with benedictions, which did not fall as barren words upon the heart of the youthful pupil. "May you," says Dr. Clarke, "be one of those sons who do honor to their literary parent. The union of *virtue* and *science* will give you distinction at the present age, and will tend to give celebrity to the name of Harvard. You will not disappoint the friends who anticipate your improvement." They who remember his college days still dwell with fondness upon his exemplary character, and his remarkable scholarship, at that period. He received his degree of bachelor of arts at Cambridge in 1796.

On leaving the university, he went to Philadelphia, at that time the seat of government, where his father resided as secretary of state. Here he commenced the study of the law under Mr. Tilghman, afterwards the distinguished chief justice of Pennsylvania, and one of the lights of American jurisprudence. But his professional lucubrations were soon suspended by his appointment, in 1797, as secretary of legation, under Mr. Smith, to Portugal. He resided, in this capacity, at Lisbon for two years, during which period he became familiar with the language and literature of the country. Later in life, when his extensive knowledge of foreign tongues opened to him, it might almost be said, the literature of the world, he recurred with peculiar pleasure to the language of Camoens and Pombal.

From Lisbon he passed to London, where, at the close of the last century, he became, for about two years, the private secretary

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[1] The reporter, *Octavius* Pickering, was the *eighth* child, which was the reason of his name.

of our minister, Mr. King, residing in the family, and enjoying the society and friendship of this distinguished man. Here he was happy in meeting with his classmate and attached friend, Dr. James Jackson, of Boston, who was then in London, pursuing those professional studies whose ripened autumnal fruits of usefulness and eminence he still lives to enjoy. In pleasant companionship they walked through the thoroughfares of the great metropolis, enjoying together its shows and attractions; in pleasant companionship they continued ever afterwards, till death severed the ties of a long life.

Mr. Pickering's youth, and inexperience in the profession to which he afterwards devoted his days, prevented his taking any special interest, at this period, in the courts or in parliament. But there were several of the judges who made a strong impression on his mind; nor did he ever cease to remember the vivacious eloquence of Erskine, or the commanding oratory of Pitt.

Meanwhile his father, being no longer in the public service, had returned to Salem; and thither the son followed, in 1801, and resumed the study of the law, under the direction of Mr. Putnam, afterwards a learned and beloved judge of the supreme court of Massachusetts, whose rare fortune it has been to rear two pupils whose fame will be among the choicest possessions of our country: Story and Pickering. In due time, he was admitted to the bar, and commenced the practice of the law in Salem.

Here begins the long, unbroken series of his labors in literature and philology, running side by side with the daily untiring business of his profession. It is easy to believe that, notwithstanding his undissembled fondness for jurisprudence as a *science*, he was drawn towards its *practice* by the compulsions of duty rather than by any attractions which it possessed for him. Not removed by fortune from the necessity, to which Dr. Johnson so pathetically alludes, of providing for the day that was passing over him, he could indulge his tastes for study only in hours secured by diligence from the inroads of business, or the seductions of pleasure. Perhaps no lawyer has lived, since the days of the Roman Orator, who could have uttered, with greater truth, those inspiring words, confessing and vindicating the cultivation of letters: "Me autem quid pudeat, qui tot annos ita vivo, judices, ut ab nullius unquam me tempore aut commodo — aut otium meum abstraxerit, aut voluptas avocârit, aut denique somnus retardârit? Quare quis tandem me reprehendat, aut quis jure succenseat, si, quantum cæteris ad suas res obeundas, quantum ad festos dies ludorum celebrandos, quantum ad alias voluptates, et ad ipsam requiem animi et corporis conceditur temporis; quantum alii tribuunt tempestivis conviviis, quantum

denique aleæ, quantum pilæ; tantum mihi egomet ad hæc studia recolenda sumpsero?"[1]

In his life may be seen two streams, flowing, side by side, as through a long tract of country; one of which is fed by the fresh fountains far in the mountain tops, whose waters leap with delight on their journey to the sea; while the other, having its sources low down in the valleys, among the haunts of men, moves with reluctant, though steady, current onward.

Mr. Pickering's days were passed in the performance of all the duties of a wide and various practice, first at Salem, and afterwards at Boston. He resided at Salem till 1829, when he removed to the latter place, where he was appointed, shortly afterwards, city solicitor; an office, whose arduous labors he continued to perform until within a few months of his death. There is little worthy of notice in the ordinary incidents of professional life. What Blackstone aptly calls "the pert debate," renews itself in infinitely varying forms. Some new turn of litigation calls forth some new effort of learning or skill, calculated to serve its temporary purpose, and like the manna, which fell in the wilderness, perishing on the day that beholds it. The unambitious labors, of which the world knows nothing, the counsel to clients, the drawing of contracts, the perplexities of conveyancing, furnish still less of interest than the ephemeral displays of the court-room.

The cares of his profession, and the cultivation of letters, left but little time for the concerns of politics. And yet he filled, at different periods, offices in the legislature of Massachusetts. He was three times representative from Salem, twice senator from Essex, once senator from Suffolk, and once a member of the executive council. In all these places, he commended himself by the same diligence, honesty, learning and ability which marked his course at the bar. The careful student of our legislative history will not fail to perceive his obligations to Mr. Pickering, as the author of several important reports and bills. The first bill providing for the separation of the district of Maine from Massachusetts, was reported by him in the senate, in 1816. Though this failed to be adopted by the people of Maine, it is characterized by the historian of that state, as "drawn with great ability and skill."[2] The report and accompanying bill, in 1818, on the jurisdiction and proceedings of the courts of probate, in which the whole system is discussed and remodelled, is from his hand.

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[1] Pro Archia, § 6.

[2] Williamson's History of Maine, Vol. II. p. 663.

In 1833, he was appointed to the vacancy, occasioned by the death of Professor Ashmun, in the commission for revising and arranging the statutes of Massachusetts, being associated in this important work with those eminent lawyers, Mr. Jackson and Mr. Stearns. The first part, or that entitled *Of the Internal Administration of the Government*, corresponding substantially with Blackstone's division *Of Persons*, was executed by him. This alone would entitle him to be gratefully remembered, not only by those who have occasion to refer to the legislation of Massachusetts, but by all who feel an interest in scientific jurisprudence.

His contributions to what may be called the literature of his profession, were frequent. The American Jurist was often enriched by articles from his pen. Among these is a Review of the valuable work of Williams on the Law of Executors; and of Curtis's Admiralty Digest, in which he examined the interesting history of this jurisdiction; also an article on the Study of the Roman Law, in which he has presented, within a short compass, a lucid sketch of the history of this system, and of the growth, in Germany, of the historical and didactic schools, "rival houses," as they may be called, in jurisprudence, whose long and unpleasant feud has only recently subsided.

In the Law Reporter, for July, 1841, he published an article of singular merit, on *National Rights* and *State Rights*, being a Review of the case of Alexander McLeod, recently determined in the supreme court of judicature of the state of New York. This was afterwards republished in a pamphlet, and extensively circulated. It is marked by uncommon learning, clearness and ability. The course of the courts of New York is handled with freedom, and the supremacy of the federal government vindicated. Of all the discussions which were elicited by that most interesting question, on which, for a while, seemed to hang the portentous issues of peace and war between the United States and Great Britain, that of Mr. Pickering will be admitted to take the lead, whether we consider its character as an elegant composition, or as a masterly review of the juridical aspects of the case. In dealing with the opinion of Mr. Justice Cowen, renowned for black-letter and the bibliography of the law, he shows himself more than a match for this learned judge, even in these unfrequented fields, while the spirit of the publicist and jurist gives a refined temper to the whole article, which we seek in vain in the other production.

In the North American Review, for October, 1840, is an article by him, illustrative of *Conveyancing in Ancient Egypt*, being an explana ion of an Egyptian deed of a piece of land in hundred-

gated Thebes, written on papyrus, more than a century before the Christian era, with the impression of a seal or stamp attached to it, and a certificate of registry on its margin, in as regular a manner as the keeper of the registry in the county of Suffolk would certify to a deed of land in the city of Boston, at this day. Here jurisprudence is gilded by scholarship.

There is another production, which, like the latter, belongs to the department of literature as well as of jurisprudence; his *Lecture on the Alleged Uncertainty of the Law*, delivered before the Boston Society for the Diffusion of Useful Knowledge. Though originally written for the general mind, which it is calculated to interest and instruct in no common degree, it will be read with equal advantage by the profound lawyer. It would not be easy to mention any popular discussion of a juridical character, in our language, deserving of higher regard. It was first published in the American Jurist, at the solicitation of the writer of these lines, who has never been able to refer to it without fresh admiration of the happy illustrations and quiet reasoning by which it vindicates the science of the law.

In considering what Mr. Pickering accomplished out of his profession, we shall be led over wide and various fields of learning, where we can only hope to indicate his footprints, without presuming to examine or explain the ground.

One of his earliest cares was to elevate the character of *classical studies* in our country. His own example did much in this respect. From the time he left the university, he was always regarded as an authority on topics of scholarship. But his labors were devoted especially to this cause. As early as 1805, he published, in conjunction with his friend, the present Judge White, of Salem, an edition of the Histories of Sallust, with Latin notes, and a copious index. This is one of the first examples, in our country, of a classic edited with scholarlike skill. The same spirit led him, later in life, to publish in the North American Review, and afterwards in a pamphlet, "Observations on the Importance of Greek Literature, and the Best Method of Studying the Classics," translated from the Latin of Professor Wyttenbach. In the course of the remarks, with which he introduces the translation, he urges with conclusive force the importance of raising the standard of education in our country. "We are too apt," he says, "to consider ourselves as an insulated people, as not belonging to the great community of Europe; but we are, in truth, just as much members of it, by means of a common public, commercial intercourse,

literature, a kindred language and habits, as Englishmen or Frenchmen themselves are; and we must procure for ourselves the qualifications necessary to maintain that rank, which we shall claim as equal members of such a community."

His "Remarks on Greek Grammars," which appeared in the American Journal of Education, in 1825, belong to the same field of labor, as does also his admirable paper, published in 1818, in the Memoirs of the American Academy,[1] on the proper pronunciation of the ancient Greek language. He maintained that it should be pronounced, so far as possible, according to the Romaic or modern Greek, and learnedly and ably exposed the vicious usage which had been introduced by Erasmus. His conclusions, though controverted when they were first presented, are now substantially adopted by scholars. We well remember his honest pleasure in a communication he received within a few years from President Moore, of Columbia College, in which that gentleman, who had formerly opposed his views, with the candor that becomes his honorable scholarship, volunteered to them the sanction of his approbation.

But the "*Greek and English Lexicon*" is his work of greatest labor in the department of classical learning. This alone would entitle him to regard from all who love liberal studies. With the well-thumbed copy of this book, used in our college days, now before us, we feel how much we are debtors to his learned toils. This was planned early in Mr. Pickering's life, and was begun in 1814. The interruptions of his profession induced him to engage the assistance of the late Dr. Daniel Oliver, Professor of Moral and Intellectual Philosophy at Dartmouth College. The work, proceeding slowly, was not announced by a prospectus until 1820, and not finally published until 1826. It was mainly founded on the well-known Lexicon of Schrevelius, which had received the emphatic commendation of Vicesimus Knox, and was generally regarded as preferable to any other for the use of schools. When Mr. Pickering commenced his labors, there was no Greek Lexicon with explanations in our own tongue. The English student obtained his knowledge of Greek through the intervention of Latin. And it has been supposed by many, who have not sufficiently regarded, as we are inclined to believe, other relations of the sub-

[1] "*Observations upon Greek Accent*" is the title of an Essay, in the Royal Irish Transactions, Vol. VII., by Dr. Browne, which was suggested, like Mr. Pickering's, by conversation with some modern Greeks, and which touches upon kindred topics. Dr. Browne is the author of the well-known and somewhat antediluvian book on the Civil and Admiralty Law.

ject, that this circuitous and awkward practice is a principal reason why Greek is so much less familiar to us than Latin. In the honorable efforts to remove this difficulty, our countryman took the lead. Shortly before the last sheets of his Lexicon were printed, a copy of a London translation of Schrevelius reached this country, which proved, however, to be "a hurried performance, upon which it would not have been safe to rely."[1]

Since the publication of his Lexicon, several others in Greek and English have appeared in England. The example of Germany, and the learning of her scholars, have contributed to these works. It were to be wished that all of them were free from the suggestion of an unhandsome appropriation of the labors of others. The Lexicon of Dr. Dunbar, Professor of Greek in the University of Edinburgh, published in 1840, contains whole pages, which are taken bodily — "convey, the wise it call" — from that of Mr. Pickering, while the preface is content with an acknowledgment in very general terms to the work which is copied. This is bad enough. But the second edition, published in 1844, omits the acknowledgment altogether; and the Lexicon is received by an elaborate article in the Quarterly Review,[2] as the triumphant labor of Dr. Dunbar, "well known among our northern classics as a clever man and an acute scholar. *In almost every page*," continues the reviewer, "*we meet with something which bespeaks the pen of a scholar;* and we every now and then stumble on explanations of words and passages, occasionally fanciful, but always sensible, and sometimes ingenious, which amply repay us for the search. . . . . *They prove, moreover, that the professor is possessed of one quality, which we could wish to see more general: he does not see with the eyes of others;* he thinks for himself, and he seems well qualified to do so." Did he not see with the eyes of others? The reviewer hardly supposed that his commendation would reach the production of an American lexicographer.

In the general department of *Languages* and *Philology*, his labors have been various. Some of the publications already mentioned might be ranged under this head. But there are others still which remain to be noticed. The earliest of these is the work generally called "*The Vocabulary of Americanisms*," being a collection of words and phrases, which have been supposed to be peculiar to the United States, with an Essay on the state of the English language in the United States. This was originally published in 1815, in the Memoirs of the American Academy, and

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[1] Preface to Pickering's Lexicon. [2] Vol. LXXV. p. 299.

was republished in a separate volume in 1816, with corrections and additions. It was the author's intention, had his life been spared, to publish another edition, with the important gleanings of subsequent observation and study. It cannot be doubted that this work has exerted a beneficial influence over the purity of our language. It has promoted careful habits of composition, and, in a certain sense, helped to guard the "wells of English undefiled." Some of the words, which are found in this Vocabulary, may be traced to ancient sources of authority; but there are many which are, beyond question, provincial and barbarous, although much used in our common speech, *fæx quoque quotidiani sermonis, fœda et pudenda vitia.*[1]

In 1818 appeared in the Memoirs of the American Academy his "*Essay on a Uniform Orthography of the Indian Languages.*" The uncertainty of their orthography arose from the circumstance that the words were collected and reduced to writing by scholars of different nations, who often attached different values to the same letter, and represented the same sound by different letters; so that it was impossible to determine the sound of a written word, without first knowing through what alembic of speech it had passed. Thus the words of the same language or dialect, as written by a German, a Frenchman, or an Englishman, would seem to belong to languages as widely different as those of these different people. With the hope of removing from the path of others the perplexities which had beset his own, Mr. Pickering recommended the adoption of a common orthography, which would enable foreigners to use our books without difficulty, and, on the other hand, make theirs easy of access to us. For this purpose, he devised an alphabet, to be applied practically to the Indian languages, which contained the common letters of our alphabet, so far as it seemed practicable to adopt them, a class of nasals, of diphthongs, and, lastly, a number of compound characters, which, it was supposed, would be of more or less frequent use in different dialects. With regard to this Essay, Mr. Duponceau said, at an early day, "If, as there is great reason to expect, Mr. Pickering's orthography gets into general use among us, America will have had the honor of taking the lead in procuring an important auxiliary to philological science."[2] Perhaps no single paper on languages, since the legendary labors of Cadmus,

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[1] De Orator. Dialogus, § 32.

[2] Notes on Eliot's Indian Grammar, Mass. Hist. Coll. Vol. XIX. p. 11.

has exercised a more important influence than this communication. Though originally composed with a view to the Indian languages of North America, it has been successfully followed by the missionaries in the Polynesian Islands. In harmony with the principles of this Essay, the unwritten dialect of the Sandwich Islands, possessing, it is said, a more than Italian softness, was reduced to writing according to a systematic orthography prepared for them by Mr. Pickering, and is now employed in two newspapers, which are published by the natives. It is thus that he may be properly regarded as one of the contributors to that civilization, under whose gentle influence those islands, set like richest gems in the bosom of the sea, have been made to glow with the effulgence of Christian truth.

The Collections of the Massachusetts Historical Society contain several important communications from him on the Indian languages; in 1822, (Vol. XIX.) an edition of the Indian Grammar of Eliot, the Augustine of New England, with introductory observations on the Massachusetts language by the editor, and notes by Mr. Duponceau, inscribed to his "learned friend, Mr. Pickering, as a just tribute of friendship and respect;" in 1823, (Vol. XX.) an edition of Jonathan Edwards's "Observations on the Mohegan Language," with introductory observations, and copious notes on the Indian languages, by the editor, and a comparative vocabulary, containing specimens of some of the dialects of the Lenape, or Delaware stock; in 1830, (Vol. XXII.) an edition of Cotton's "Vocabulary of the Massachusetts Language." These labors were calculated, in no ordinary degree, to promote a knowledge of the aboriginal idioms of our country, and to shed light on that important and newly attempted branch of knowledge, the comparative science of languages.

Among the Memoirs of the American Academy, published in 1833, (New Series, Vol. I.) is the "Dictionary of the Abenaki Language, in North America," by Father Sebastian Rasles, with an introductory memoir, and notes, by Mr. Pickering. The original manuscript of this copious Dictionary, commenced by the good and indefatigable Jesuit in 1691, during his solitary residence with the Indians, was found among his papers after the massacre at Norridgewalk, in which he was killed, and, passing through several hands, at last came into the possession of Harvard College. It is considered one of the most interesting and authentic memorials in the history of the North American languages. In the memoir which accompanies the Dictionary, Mr. Pickering says, with the modesty that marked all his labors, that he made inquiries

for memorials of these languages, "hoping that I might render some small service, by collecting and preserving these valuable materials for the use of those persons whose leisure and ability would enable them to employ them more advantageously, than it was in my power to do, for the benefit of philological science."

The elaborate article on the "*Indian Languages of America*," in the Encyclopædia Americana, is from his pen. The subject was considered so interesting, in regard to general and comparative philology, while so little was generally known respecting it, that it was allowed a space more than proportionate to the usual length of philological articles in that work.

The forthcoming volume of the Memoirs of the American Academy contains an interesting paper of a kindred character, one of his latest productions, on the language and inhabitants of Lord North's Island, in the Indian Archipelago, with a vocabulary.

The Address before the American Oriental Society, published in 1843, as the first number of the Journal of that body, is a beautiful contribution to the history of languages, presenting a survey of the peculiar field of labor to which the Society was devoted, in a style which attracts alike the scholar and the less careful reader.

Among his other productions in philology, may be mentioned an interesting article on the *Chinese language*, which first appeared in the North American Review, and was afterwards *dishonestly reprinted, as an original article*, in the London Monthly Review for December, 1840; also an article on the *Cochin-Chinese language*, published in the North American Review for April, 1841; another on Adelung's "Survey of Languages," in the same journal, in 1822; a review of Johnson's Dictionary, in the American Quarterly Review for September, 1828; and two articles in the New York Review for 1826, being a caustic examination of General Cass's article in the North American Review, respecting the Indians of North America. These two articles were not acknowledged by their author at the time they were written. They purport to be by Kass-*ti-ga-tor-skee*, or the *Feathered Arrow*, a fictitious name from the Latin Cas-*tigator*, and an Indian termination *skee* or *ski*.

But even this enumeration does not close the catalogue of Mr. Pickering's labors. There are still others, to which, however, we shall refer by their titles only, which may be classed with contributions to *general literature*. Among these is an Oration, delivered at Salem on the Fourth of July, 1804; an article in the North American Review, (Vol. XXVIII.) on Elementary In-

struction; a Lecture on Telegraphic Language, delivered before the Boston Marine Society, and published in 1833; an article on Peirce's History of Harvard University, in the North American Review for April, 1834; an article on Prescott's History of the Reign of Ferdinand and Isabella, in the New York Review for April, 1838; the noble Eulogy on Dr. Bowditch, delivered before the American Academy, May 29, 1838; and obituary notices of Mr. Pierce, the Librarian of Harvard College; of Dr. Spurzheim; of Dr. Bowditch; and of his valued friend and correspondent, the partner of his philological labors, Mr. Duponceau; also, an interesting Lecture, still unpublished, on the Origin of the Population of America, and two others on Languages.

The reader will be astonished at these various contributions to learning and literature, which we have thus hastily reviewed, particularly when he regards them as the diversions of a life, filled in amplest measure by other pursuits. Charles Lamb said that his *real works* were not his published writings, but the ponderous folios copied by his own hand, in the India House. In the same spirit, Mr. Pickering might point to the multitudinous transactions of his long professional life, the cases argued in court, the conferences with clients, and the deeds, contracts, and other papers, in that clear, legible autograph, which is a fit emblem of his transparent character.

His professional life, then, first invites our attention. And here it should be observed, that he was a thorough, hard-working lawyer, for the greater part of his days in *full practice*, constant at his office, attentive to all the concerns of business, and to what may be called the humilities of his profession. He was faithful, conscientious and careful in all that he did; nor did his zeal for the interests committed to his care ever betray him beyond the golden mean of duty. The law, in his hands, was a shield for defence, and never a sword with which to thrust at his adversary. His preparations for arguments in court were marked by peculiar care; his brief was very elaborate. On questions of law he was learned and profound, but his manner in court was excelled by his matter. The experience of his long life never enabled him to overcome the native childlike diffidence, which made him shrink from public displays. He developed his views with clearness, and an invariable regard to their logical sequence; but he did not press them home by energy of manner, or any of the ardors of eloquence.

His mind was rather judicial than forensic in its cast. He was better able to discern the right than to make the wrong appear the

better reason. He was not a legal athlete, snuffing new vigor in the hoarse strifes of the bar, and regarding success alone; but a faithful counsellor, solicitous for his client, and for justice too.

It was this character that led him to contemplate the law as a science, and to study its improvement and elevation. He could not look upon it merely as a means of earning money. He gave much of his time to its generous culture. From the walks of practice, he ascended to the heights of jurisprudence, embracing within his observation the systems of other countries. His contributions to this department illustrate the spirit and extent of his inquiries. It was his hope to accomplish some careful work on the law, more elaborate than the memorials he has left. The subject of the *Practice and Procedure of Courts*, or what is called by the civilians *Stylus Curiæ*, had occupied his mind, and he had intended to treat it in the light of the foreign authorities, particularly the German and French, with the view of determining the general principles or natural law, common to all systems, by which it is governed. Such a work, executed in the fine, juridical spirit in which it was conceived, would have been welcomed wherever the law is studied as a science.

It is, then, not only as a lawyer, practising in courts, but as a jurist, to whom the light of jurisprudence shone gladsome, that we are to esteem our departed friend. As such, his example will command attention, and exert an influence, long after the paper dockets, in blue covers, chronicling the stages of litigation in his cases, shall be consigned to the oblivion of dark closets, and cob-webbed pigeon-holes.

But he has left a place vacant, not only in the halls of jurisprudence, but also in the circle of scholars throughout the world, it may almost be said, in the Pantheon of universal learning. In contemplating the variety, the universality, of his attainments, the mind involuntarily exclaims, "the admirable Pickering!" He seems, indeed, to have run the whole round of knowledge. His studies in ancient learning had been profound; nor can we sufficiently admire the facility with which, amidst other cares, he assumed the task of the lexicographer, which Scaliger compares to the labors of the anvil and the mine. Unless some memorandum should be found among his papers, as was the case with Sir William Jones,[1]

[1] Sir William Jones had studied eight languages, critically,—English, Latin, French, Italian, Greek, Arabic, Persian, Sanscrit; eight others less perfectly, but all intelligible, with a dictionary,—Spanish, Portugese, German, Runic, Hebrew, Bengali, Hindi, Turkish; twelve studied less perfectly, but all attainable,—Tibetian, Pali, Phalari, Deri, Russian, Syriac, Ethiopic, Coptic, Welsh, Swedish, Dutch, Chinese; in all, twenty-eight languages. — *Teignmouth's Life of Jones.*

specifying the languages to which he had been devoted, it may be difficult to frame a list with entire accuracy. It is certain that he was familiar with at least *nine*, — the English, French, Portuguese, Italian, Spanish, German, Romaic, Greek, and Latin; of these he spoke the first five. He was less familiar, though well acquainted, with the Dutch, Swedish, Danish, and Hebrew; and had explored, with various degrees of care, the Arabic, Turkish, Syriac, Persian, Coptic, Sanscrit, Chinese, Cochin-Chinese, Russian, Egyptian hieroglyphics, the Malay in several dialects, and particularly the Indian languages of America and of the Polynesian Islands.

The sarcasm of Hudibras on the "barren ground," supposed to be congenial to "Hebrew roots," is refuted by the richness of his accomplishments. His style is that of a scholar and man of taste. It is simple, unpretending, like its author, clear, accurate, and flows in an even tenor of elegance, which rises at times to a suavity, almost Xenophontean. Though little adorned by flowers of rhetoric, it shows the sensibility and refinement of an ear attuned to the harmonies of language. He had cultivated music as a science, and in his younger days performed on the flute with Grecian fondness. Some of the airs which he had learned in Portugal, were sung to him by his daughter, shortly before his death, bringing with them, doubtless, the pleasant memories of early travel, and of the "incense-breathing morn" of life. A lover of music, he was naturally fond of the other fine arts, but always had particular happiness in works of sculpture.

Nor were those other studies, which are sometimes regarded as of a more practical character, alien to his mind. In his college days he was noticed for his attainments in mathematics; and later in life, he perused with intelligent care the great work of his friend, Dr. Bowditch, the translation of the *Mécanique Céleste*. He was chairman of the committee which recommended the purchase of a telescope of the first class, to be used in the neighborhood of Boston, and was the author of their interesting report on the uses and importance of such an instrument. He was fond of natural history, particularly of botany, which he himself taught to some of his family. In addition to all this, he possessed a natural aptitude for the mechanic arts, which was improved by observation and care. Early in life he learned to use the turning lathe, and, as he declared, in an unpublished lecture before the Mechanics Institute of Boston, made toys and playthings which he bartered among his schoolmates.

The latter circumstance gives singular point to the parallel, al-

ready striking in other respects, between him and the Greek orator, the boast of whose various knowledge is preserved by Cicero. "Nihil esse ulla in arte rerum omnium, quod ipse nesciret; nec solum has artes, quibus liberales doctrinæ atque ingenuæ continerentur, geometriam, musicam, literarum cognitionem, et poetarum, atque illa quæ de naturis rerum, quæ de hominum moribus, quæ de rebuspublicis dicerentur; *sed annulum, quem haberet, se sua manu confecisse.*"[1]

It is, however, as a friend of classical studies, and as a student of language, or a philologist, that he is entitled to be specially remembered. It is impossible to measure the influence which he has exerted upon the scholarship of the country. His writings and his example, from early youth, have pleaded its cause, and will plead it still now that his living voice is hushed in the grave. His genius for languages was profound. He saw, with intuitive perception, their structure and affinities, and delighted in the detection of their hidden resemblances and relations. To their history and character he devoted his attention, more than to their literature. It would not be possible for our humble pen to attempt to determine the place which will be allotted to him in the science of philology; but the writer cannot forbear recording the authoritative testimony, which it was his fortune to hear, from the lips of Alexander von Humboldt, to the rare merits of Mr. Pickering in this department. With the brother, William von Humboldt, that great light of modern philology, he maintained a long correspondence, particularly on the Indian languages; and the letters of our countryman will be found preserved in the royal library at Berlin. Without rashly undertaking, then, to indicate any scale of preëminence or precedence among the cultivators of this department, at home or abroad, it may not be improper to say of his labors, in the words of Dr. Johnson, with regard to his own,[2] "that we may now no longer yield the palm of philology, without a contest, to the nations of the continent."

If it should be asked by what magic Mr. Pickering was able to accomplish these remarkable results, it must be answered, by the careful husbandry of time. His talisman was industry. He was pleased in referring to those rude inhabitants of Tartary who placed idleness among the torments of the world to come, and often remembered the beautiful proverb in his Oriental studies, that by labor the leaf of the mulberry tree is turned into silk. His life is a

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[1] De Oratore, Lib. III. § 32.

[2] Preface to Dictionary.

perpetual commentary on those words of untranslatable beauty in the great Italian poet:[1]

"——— seggendo in piuma
In fama non si vien, nè sotto coltre:
Sanza la qual, chi sua vita consuma
Cotal vestigio in terra di se lascia,
Qual fumo in aere od in acqua la schiuma."

With a mind, thus deeply imbued with learning, it will be felt that he was formed less for the contentions of the forum than the delights of the academy. And yet, it is understood that he declined several opportunities, which were afforded him, of entering its learned retreats. In 1806, he was elected Hancock professor of Hebrew, and other Oriental languages, in Harvard University; and, at a later day, he was invited to the chair of Greek literature, in the same place. On the death of Professor Ashmun, many eyes were turned towards him, as a proper person to occupy the professorship of law in Cambridge, which has been since so ably filled by Mr. Greenleaf;[2] and, on two different occasions, his name was echoed by the public prints as about to receive the dignity of president of the university. But he continued, as we have seen, in the practice of the law to the last.

He should be claimed with peculiar pride by the bar. If it be true, as has been said of Sergeant Talfourd, that he has reflected more honor upon his profession, by his successful cultivation of letters, than any of his contemporaries by their forensic triumphs, then should the American bar acknowledge their obligations to the fame of Mr. Pickering. He was one of us. He was a *regular* in our ranks; in other services, only a *volunteer*.

The mind is led, instinctively, to a parallel between him and that illustrious scholar and jurist, one of the ornaments of the English law, and the pioneer of Oriental studies in England, Sir William Jones. Both confessed, in early life, the attractions of classical studies; both were trained in the discipline of the law; both, though engaged in its practice, always delighted to contem-

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[1] Dante, Inferno, Canto 25.

[2] The lovers of the science of law will learn with pleasure that the benchers of the Temple have appointed Mr. George Long, well known for his scholarship in Europe and America, reader on the civil [Roman] law and jurisprudence. The other inns will be compelled to follow this example; and students will no longer be able merely *to eat* their way to the bar. In the joint cultivation of classical and juridical studies, Mr. Long is not unlike Mr. Pickering.

plate it as a science; both surrendered themselves, with irrepressible ardor, to the study of languages, while the one broke into the unexplored fields of Eastern philology, and the other devoted himself more especially to the native tongues of his own continent. Their names are, perhaps, equally conspicuous for the number of languages which had occupied their attention. As we approach them in private life, the parallel still continues. In both there was the same truth, generosity and gentleness, a cluster of noble virtues; while the greater earnestness of the one, is compensated by the intenser modesty of the other. To Pickering, also, may be applied those words of the Greek couplet, written in honor of his prototype: "The Graces, seeking a shrine that would not decay, found the soul of Jones."

While dwelling with admiration upon his triumphs of intellect, and the fame he has won, let us not forget the virtues, higher than intellect or fame, by which his life was adorned. In the jurist and the scholar let us not lose sight of the *man*. So far as is allotted to a mortal to be, he was a spotless character. The rude tides of this world seemed to flow by without soiling his garments. He was pure in thought, word and deed. He was a lover of truth, goodness and humanity. He was the friend of the young, encouraging them in their studies, and aiding them by his wise counsels. He was ever kind, considerate and gentle to all; towards children, and the unfortunate, full of tenderness. He was of modesty "all-compact." With learning to which all bowed with reverence, he walked humbly alike before God and man. His pleasures were simple. In the retirement of his study, and in the blandishments of his music-loving family, he found rest from the fatigues of the bar. He never spoke in anger, nor did any hate find a seat in his bosom. His placid life was, like law, in the definition of Aristotle, "mind without passion."

Through his long career, which was extended to the extreme limit of that length of days which is allotted to man, he was blessed with unbroken health. He walked on earth with an unailing body and a serene mind. And at last, in the fullness of time, when the garner was overflowing with the golden harvests of a well-spent life, in the bosom of his family, the silver cord was gently loosened. He died in Boston, May 5th, 1846, in the seventieth year of his age, — only a few days after he had revised the last proof-sheet of a third edition of his Greek Lexicon. His wife, to whom he was married in 1805, and three children, survive to mourn their irreparable loss, and to rejoice in his good name on earth, and his immortality in heaven.

The number of societies, both at home and abroad, of which he was an honored member, attests the wide-spread recognition of his merits. He was president of the American Academy of Arts and Sciences; president of the American Oriental Society; foreign secretary of the American Antiquarian Society; fellow of the Massachusetts Historical Society; of the American Ethnological Society; of the American Philosophical Society; honorary member of the historical societies of New Hampshire, of New York, of Pennsylvania, of Rhode Island, of Michigan, of Maryland, of Georgia; of the National Institution for the Promotion of Science; of the American Statistical Association; of the Northern Academy of Arts and Sciences, Hanover, N. H.; of the Society for the Promotion of Legal Knowledge, Philadelphia; corresponding member of the Royal Academy of Sciences at Berlin; of the Oriental Society of Paris; of the Academy of Sciences and Letters at Palermo; of the Antiquarian Society at Athens; of the Royal Northern Antiquarian Society at Copenhagen; and titular member of the French Society of Universal Statistics.

For many years he maintained a copious correspondence, on matters of jurisprudence, science and learning, with distinguished names at home and abroad; especially, with Mr. Duponceau, at Philadelphia; with William von Humboldt, at Berlin; with Mittermaier, the jurist, at Heidelberg; with Dr. Pritchard, author of the Physical History of Mankind, at Bristol; and with Lepsius, the hierologist, who wrote to him from the foot of the pyramids in Egypt.

The death of one, thus variously connected, is no common sorrow. Beyond the immediate circle of family and friends, he will be mourned by the bar, amongst whom his daily life was passed; by the municipality of Boston, whose legal adviser he was; by clients, who depended upon his counsels; by all good citizens, who were charmed by the abounding virtues of his private life; by his country, who will cherish his name more than gold or silver; by the distant islands of the Pacific, who will bless his labors in every written word that they read; finally, by the company of jurists and scholars throughout the world. His fame and his works will be fitly commemorated, on formal occasions, hereafter. Meanwhile, one who knew him at the bar and in private life, and who loves his memory, lays this early tribute upon his grave.

Recent American Decisions.

Circuit Court of the United States for the District of Georgia, Sixth Circuit.

William Neves and James C. Neves *v.* William F. Scott and Richard Rowell.

Two parties, intending marriage, entered into articles of agreement between themselves, without the intervention of trustees, and without the concurrence of any other party, by which they agreed that all property which then was or should thereafter become their right, should remain in common between them during their natural lives, and was to continue the property of the survivor until death, and then to be divided among the heirs of one and the heirs of the other, share and share alike. The parties intermarried; each acquired property during the marriage; the wife survived the husband, kept possession of the property, and married again, and at her death, without issue, her second husband took possession of the whole estate. The first husband, before his death, had made a will, devising one half of his estate to another party. The brothers of the first husband brought a bill in equity, claiming one half of the estate as his heirs, under the original articles, alleging that the will could not control the articles, and praying for a division of the estate, and for an injunction against the devisee, from setting up any right under the will. On general demurrer, it was *held*, —

1. That the articles of agreement constituted an executory, and not an executed, agreement.
2. That a volunteer, or one who is not within the influence of the consideration of an executory agreement, or who does not claim through one who is within it, cannot maintain a bill to enforce its performance.
3. That the complainants, being brothers of the first husband, were not within the influence of the marriage consideration; and since they claimed the estate on the ground that the terms by which they were designated in the articles of agreement were words of purchase, and not words of limitation, they did not claim through a party who was within the influence of the consideration, and were therefore volunteers.
4. That in equity, what ought to be done should be considered as having been done; that the estate must be considered as having become vested in the first husband, according to the rule in *Shelley's case;* and the heirs could only claim through him, and not in their own right.
5. That the consideration of marriage and a portion extends only to the husband, the wife, and their issue, unless the settlement is made through the instrumentality of a third party, whose concurrence is necessary.
6. But that, where an action of law might be brought in the name of trustees, to

recover damages for the non-performance of a covenant, *it seems* that equity would enforce the specific execution of the covenant.

7. That, upon the foregoing considerations, the demurrer should be allowed.

This was a bill filed by the complainants, against the defendants, to enforce the articles of agreement entered into by John Neves and Catharine Jewell, anterior to their intermarriage, dated February 17, 1810, by which it was agreed "that all the property, both real and personal, which there was or may thereafter become the right of the said John and Catharine should remain in common between them, the said husband and wife, during their natural lives; and should the said Catharine become the longest liver, the property to continue hers so long as she shall live, and at her death to be divided between the heirs of her, the said Catharine, and the heirs of the said John, share and share alike, agreeably to the distribution laws of the state made and provided. And, on the other hand, should the said John become the longest liver, the property to remain in the manner and form as above."

The bill alleged that the said marriage took place; that, subsequently thereto, the said John purchased many slaves and other property, and that the said Catharine acquired, by a bequest from her sister, other property of value; that the said John died in 1828, never having had any children, leaving the complainant William Neves, and his brother, and the complainant James C. Neves, his nephew, his heirs at law, and leaving a large estate, real and personal; that, after the death of the said John, all of said property (except some she disposed of) remained in the possession of the said Catharine, his widow, until her subsequent intermarriage with the defendant, William F. Scott, in the year 1835; that the said Scott, after his marriage, exercised control over said property; that the said Catharine died in 1844, without ever having had issue, and leaving the said William F. the sole heir at law of her half or share of said estate, and who possessed himself of the whole estate, and refused to account with the complainants for their half, &c. The bill then further alleged that John Neves, when on his death-bed, and when *in extremis*, made a will, under the coercion and fraudulent procurement of the other defendant, Richard Rowell, by which John devised and bequeathed one half of his estate to George Rowell, the son of Richard; but the complainants allege that the will could not affect their vested rights under the deed of marriage settlement, whether the will be valid or not; but that Richard Rowell, as executor of said fraudulently procured will, claims one half of said estate adversely to the complainants. The bill then further

alleges that both the defendants are estopped from disputing the rights of the complainants as vested under and by virtue of the deed of marriage settlement, because it has been heretofore judicially and finally adjudicated in the superior court of Baldwin county, Georgia, that the marriage settlement was not affected or controlled by the will of said John Neves, which adjudication took place in a proceeding on the equity side of said superior court, wherein the said Catharine, then Catharine Neves, was complainant, setting up and insisting on the deed of marriage settlement as paramount to said will, and Richard Rowell was defendant; and afterwards Richard Rowell was complainant in a cross bill, and Catharine and William F. Scott were defendants; William F. having also been made a party to the original bill *perdente lite;* and it refers to said equity proceedings as exhibits to the complainants' bill. The prayer of the bill was for a division of the whole estate in the hands and control of the defendant Scott, between the complainants and the defendant Scott; and that the defendant Richard Rowell, be perpetually enjoined from setting up any right under the will, &c.; and for further relief. The bill, answers, cross bill, &c. between Catharine Neves and Richard Rowell (to which the defendant Scott was subsequently made a party) are very voluminous, but the only part necessary to set forth is the final decree of the special jury (who, in the state courts of Georgia, act as co-chancellors with the judge,) in said cause, which final decree was as follows:

"We, the jury, find for the complainant a life estate in the property, agreeably to the provisions of the marriage contract, leaving all other persons to contest their rights at her death; and we further find that the complainants do pay to defendant the sum of nine hundred and two dollars and seventy-five cents, which have been allowed by the special jury, at this term, upon an appeal from the court of ordinary, as expenses and cost, incurred by the defendant in proving the will of John Neves, deceased, and resisting the marriage contract between John Neves and Catharine Neves, his wife; and we further find for the complainant the costs of suit.

"S. Boykin, *Foreman.*"

To this bill of complainants, general demurrers were filed by the defendants respectively, and the demurrers were argued upon paper, and submitted to the court. The ground relied on in support of the demurrers, was, that the complainants were volunteers, not within the scope of the marriage contract, which, it was alleged, was only an executory, and not an executed, contract; in other words, that it was only marriage articles, and not a marriage settle-

ment; and that a court of equity would never lend its aid to a mere volunteer, to enforce an executory agreement. The decision was made by his honor,

Nicoll, J. The agreement which forms the subject of the bill in this case was entered into by John Neves and Catharine Jewell, on the eve of their marriage. They were the only parties to it, and it was founded exclusively on the consideration of marriage, and other considerations moving only between the parties themselves. The consideration of such an agreement extends only to the husband and wife and their issue. *Osgood* v. *Strode*, (2 P. Wms. 245); Atherly, 125, 127–151; 2 Story's Eq. Jurisp. § 986; Sugd. Vend. 466, 467, (fifth ed.); *Bradish*, v. *Gibbs*, (3 John. Ch. 550); 2 Kent, 172, 173. And it is admitted by the counsel for the plaintiffs, that a volunteer, one who is not within the influence of the consideration of an executory agreement, or who does not claim through one who is, cannot seek the aid of a court of equity to enforce its performance. *Coleman* v. *Sarrel* (1 Ves. Jr. 50); 3 Brocc. 12; 1 Fonb. 406; Story's Eq. Jurisp. § 433, 973, 986; Atherly, 398, 399. That the instrument under which the plaintiffs ask the interposition of the court constitutes an executory, and not an executed, agreement, can scarcely admit of doubt. It is in terms an executory, and not an executed, agreement, and of the most informal character. It transfers no property, passes no estate, declares no trustees, and contains no word of direct and immediate conveyance, and nothing to indicate that it was a complete and actual settlement. It relates not merely to property in possession, but to that which might be acquired in future; and the greater part of that which is the subject matter of the plaintiffs' bill was subsequently acquired either by purchase or descent, and could not be the subject of an executed contract. The title of the plaintiffs therefore rests entirely in covenant. *Coleman* v. *Sarrel*, (1 Ves. Jr. 54); *Ellison* v. *Ellison*, (6 Id. 656); *Antrobus* v. *Smith*, (12 Id. 39–46); Atherly, 186. It is an executory agreement, then, to enforce which the interference of a court of equity cannot be obtained at the instance of a volunteer.

Now the bill, in this case, seeks the aid of the court upon the ground, that, by the stipulations of the marriage agreement, the plaintiffs were to have the absolute and entire property after the expiration of the life estate of Neves and his wife; that the precedent estate vested in Neves and wife; the first taken under the articles, was circumscribed to, and could not endure beyond, their lives; and that by the limitation over, the plaintiffs became entitled to the property, not by succession or descent, as coming in, *in the*

estate of the first taker, but as taking originally in the capacity of purchasers in their own right; in other words, that the terms under which they claim title, and by which they are designated, are words of purchase, and not words designed to indicate the quantity of interest or magnitude of the estate which Neves and wife took; that consequently the interest of Neves and wife was limited to a life estate, the remainder did not become executed in possession in them, and that they and neither of them could by will, or otherwise, control or dispose of the property, after the termination of their respective lives, or bar the plaintiffs. Such is the aspect in which the claim of the plaintiffs is presented by their bill, and such was the construction given to the instrument by the bill, instituted by Mrs. Neves, in her lifetime, in Baldwin superior court. Since, then, the plaintiffs, who are the brothers of the husband Neves, are not within the influence of the marriage consideration, and since they claim to take, not derivatively or by transmission, from or *through* either or any of the parties, who came within the influence of that consideration, they are unquestionably volunteers, and are not entitled to the aid which they seek.

The view which I have taken is sustained by the authorities whose aid has been invoked by the counsel for the plaintiffs. The cases referred to by them may be resolved into three classes:

1. It is an established principle in equity, that what ought to be done shall be considered as done; "and a rule so powerful it is as to alter the very nature of things, to make money land, and, on the contrary, to turn land into money; thus money articled to be laid out in land, shall be taken as land, and descend to the heir." *Lechmere* v. *Lord Carlisle*, (3 P. Wms. 215); *Babington* v. *Greenwood*, (1 Id. 532). It is also a well-settled rule of law, which equity must follow (Butler, n. 249, xiv. to Co. L.); that if by one and the same instrument, a life estate is given to a person, with a limitation in remainder to his heirs in fee, whether with or without the interposition of an intermediate estate, the remainder unites with the precedent life estate, and is immediately executed in possession in the person who takes the life estate, who thus becomes seised of an immediate estate in fee. The word "heirs" is in such a case a word of limitation of the estate, and the heirs of the first taker take not by purchase, in their own right, but as standing in the place of the first taker, and embraced in the extent and measure of the estate of which he was seised. The heir takes not originally in his own right, but through the first taker. Shelley's case, 1 Coke R. 93. When, then, it is agreed by marriage articles, that money shall be laid out in lands, to be settled, for example, on the

husband for life, with remainder to the sons of the marriage in tail male, remainder to the daughters, remainder to the heirs of the husband, forever, and the husband dies without issue; as a court of equity will, upon the application of one who has a right to pray that the agreement be executed; consider the money as land, and treat the investment as actually made in the lifetime of the husband, it regards him as seised, in his lifetime, of an estate in fee, which of course, upon his death, devolves by descent or transmission upon his heir, who succeeds through the husband to the estate thus vested in the latter, and does not become entitled to it by purchase, that is, originally in his own right. To this class may be referred *Kettleby* v. *Atwood*, (2 Vern. 298, 471); *Lancey* v. *Fairchild*, (2 Id. 101); *Knights* v. *Atkyns*, (Id. 20); *Edwards* v. *Countess of Warwick*, (2 P. Wms. 171); 4 Bro. P. C. 494; 3 Atkyns, 447; *Lechmere* v. *Earl Carlisle*, (3 P. Wms. 211); Cases T. Talbot, 80; Atherly, 126, 127, 398; 2 Powell on Contracts, 104.

Indeed, the only inquiry in these cases was, whether the property was to be considered land or money; in other words, whether the heir or personal representative was entitled to it; for if it were to be regarded as land, there could be no doubt that it would go to the heir. If the land had been purchased and settled in the lifetime of the husband, in the case which I have supposed, as in the cases to which reference has been made, it could not be questioned that it would have descended to the heir, whether he were a collateral or not; he would have been entitled to it as standing in the place of his ancestor and coming within the limitation of his estate. And the ground expressly assumed by counsel, and acted upon by the court, in some of the cases, was, that the estate of the husband, upon whom the land was to be settled for life, and that of his heir, constituted one and the same estate; that the remainder in fee united with the life estate, and became executed in the husband, who thus became seised of the fee; and that, as a specific performance of the agreement would have been enforced at the instance of the husband if in life, it would in like manner be enforced on the prayer of the heir, who was embraced in the husband, and succeeded to his estate. See also Co. L. 226.

2. Although the consideration of marriage and a portion extends only to the husband, wife and their issue, yet where the settlement is made through the instrumentality of a party whose concurrence is necessary to the validity of the settlement, and who insists upon a provision in favor of a person, for instance, a younger child, a collateral relation of the husband, who would not come within the consideration of marriage, such person is held not to be a mere vol-

unteer, but as falling within the range of the consideration of the agreement. Such are the cases of *Osgood* v. *Strode*, (2 P. Wms. 245); *Goring* v. *Nash*, (3 Atk. 186); to which may be added *Roe* e. d. *Hamerton* v. *Whitton*, (2 Wils. 356). But these cases themselves establish that the marriage consideration alone will not support the limitation to a brother or sister, and are therefore adverse to the claim of the present plaintiffs. In *Osgood* v. *Strode*, the father and son each "having an interest in the premises, so that one without the other could not make a settlement thereof," on the treaty of marriage of the son, in consideration of the marriage and of a portion paid to the son, covenanted with trustees, *inter alia*, that the premises should be settled on the son for life, remainder to the sons of the marriage in strict settlement, remainder to the plaintiff, a grandson of the father and nephew of the son, and his heirs male, remainder to the right heirs of the father. The father died, and afterwards, the son and his wife, without any issue. Lord Macclesfield, in delivering his decision, said: "The marriage and marriage portion support only the limitations to the husband and wife, and their issue; this is all that is presumed to have been stipulated for by the wife and her friends. But," he proceeds, "each of them, Lawrence Head (the father) and Edward Head (the son,) having an interest in the premises, so that one without the other could not make a settlement thereof, here is now a proper person for old Lawrence Head, the father, to stipulate with his son Edward, and it may be well intended that old Lawrence Head did stipulate with his son Edward, that he (Lawrence) would come into these articles, and join therein, on terms that the estate should, in case of Edward's dying without issue male of the marriage, &c., then go to the plaintiff Osgood; and this was probably part of the marriage agreement, and of the terms on which it was made; though the leaving out the sons of Edward by any other marriage might be a mistake. But since this might be, and probably was, nay, appears to have been, the terms of this marriage agreement, and the inducement to old Lawrence Head to join therein, equity ought to decree the performance of it; but I will give no costs." The ground, therefore, on which that case was decided, was, that the provision for the plaintiff came within the consideration of the agreement, which was a valuable one, the parting with an estate by a party, other than the husband and wife, whose concurrence in the agreement was essential to its validity; while the case also establishes that the plaintiffs here are mere volunteers, the limitations to whom are not supported by the consideration of the agreement between Neves and his wife.

In *Goring* v. *Nash* (3 Atk. 186,) a father seised in fee had an only son and four daughters. On the marriage of his son, he entered into articles, by which he agreed to settle the estate to the uses of the marriage, with remainder, to the use of Lady Goring, one of the daughters, in tail male, remainder over. The son died without issue. The father then died; and the legal fee descended upon Lady Goring and her three sisters. No settlement having been made in pursuance of the articles, Lady G. brought her bill against her three sisters, to have the articles carried into effect. One of the grounds upon which Lord Hardwicke rested his decree, was, that it was a provision by a father for his daughter; (p. 189,) that it was a provision for younger children, which is always favored in a court of equity, and carried into execution. That such children are considered purchasers by reason of the natural obligation of parents to provide for their children (p. 191,) and the court has always decreed the provision made by a parent for a child to be as extensive as the parent intended it, when it does not introduce a hardship, or leave the other children in distress (p. 192.) And so far from his judgment importing that a specific performance would be decreed at the instance of collaterals, the reverse is implied. The import of his remark is, that such a decree will not be made at the instance of a collateral, but if such decree be made at the instance of a younger child, the articles will, according to the course of chancery, be carried into effect in whole, and not in part only, and thus will be executed in favor of collaterals. He says, (p. 189,) all the decrees for specific performance of marriage articles on limitations for younger children, are authorities in favor of the plaintiff, and where such articles have been decreed at all, they have been carried into execution even as to collaterals, and not carried into execution in part only (p. 190.) There is no instance of decreeing a partial performance of articles; the court must decree all or none; and where some parts have appeared unreasonable, the court has said, "We will not do that, and therefore, as we must decree all or none, the bill has been dismissed." . . . "Nobody can tell what it is the parties who are dead have laid the greatest weight upon in coming to agreements, and therefore it would be attended with bad consequences, if agreements were to be split, and one part decreed but not another." (2 Kent, 172–3.) The case of *Roe* v. *Milton*, (2 Wils. 356,) where a mother interested in the estate united in a settlement, making a provision for a younger son, rests upon the same principle, and is also an authority in support of the proposition that the marriage consideration alone

will not sustain a limitation to brothers. See also *Stephens* v. *Trueman* (1 Ves. Jr. 74.)

3. One of the grounds on which Lord Hardwicke placed his decision, in the case of *Goring* v. *Nash*, was, that an action of law might have been brought, in the name of the trustees, for the recovery of damages, for the non-performance of the covenant, and, therefore, to avoid the circuity of bringing such an action, and afterwards of applying to equity to have the damages invested in land, and settled according to the terms of the articles, and also, because a court of law has no means of apportioning the damages according to the respective rights of the parties, equity would enforce the specific execution of the covenant. And it is upon this ground that Lord King principally rested his decree in the case of *Vernon* v. *Vernon* (2 P. Will. 594.) See also 3 Atk. 190; *Stephens* v. *Trueman* (1 Ves. Jr. 74); *Williams* v. *Codington* (Id. 513, arguendo.) But such a ground is treated as forming an exception to the general rule, (1 Ves. Jr. 74,) and leaves this, and other cases where the same ground does not exist, subject to the operation of the rule. There are other circumstances which contributed to influence the decision in the case of *Vernon* v. *Vernon*. The eldest brother of the family had bequeathed a large personal estate to the husband, with a limitation over to the plaintiffs, his other brothers, upon a contingent event, which, making the limitation void, vested the husband with the absolute and entire interest; and Lord King thought that the husband might be induced to enter into the covenant, to make to the plaintiffs some recompense or satisfaction for what was intended them by the bequest. The father, also, was a party to the articles, and, it appears from the report in 4 Bro. P. C. 31, "insisted upon the provision for the plaintiffs, and afterwards declared that it should never have been a match if the wife and her friends, as well as the husband, had not agreed to make the settlement in that manner;" thus assimilating it to the second class of cases which I have enumerated. But to whichever of these grounds the decision in *Vernon* v. *Vernon* may be referred, it must be obvious that that case can be considered as an authority only in cases similarly circumstanced.

Within no one of these classes does the case under consideration fall. There exists nothing, therefore, to relieve it from the operation of the general rule, that the performance of a contract will not be enforced at the instance of a volunteer. And since the consideration of a marriage, or a portion, or other consideration, moving only between husband and wife, (and no other consideration exists here,) will not extend beyond the husband and wife, and their

issue, — and collaterals and all other persons are mere volunteers, — the plaintiffs in this case, who are such collaterals, are not entitled to the aid which they pray.

The demurrer is therefore allowed.

Seaborn Jones and *S. T. Bailey*, solicitors for the complainants.
Francis H. Cone, solicitor for the defendant Rowell.
Kenan and Rockwell, and *Robert M. Charlton*, solicitors for the defendant Scott.

Superior Court of the City of New York, in full Bench, April, 1846, *at New York.*

SUSAN PARKER *v.* WILLIAM EMERSON AND OTHERS, EXECUTORS.

In the state of New York, a man's own promissory note is a good subject of a *donatio causa mortis*.

In England, the rule is otherwise. There a man's own bond has been held a good subject for this species of gift, but it has been held otherwise as to his note.

The courts in Massachusetts and Connecticut have followed the English rule.

THIS was an action brought to recover on a note of $5000 made by the testator, dated Concord, New Hampshire, September 20, 1843, for value received, payable on demand to the plaintiff, or order, with interest. The cause was laid before Judge Oakly on the 20th of June, 1845. The plaintiff is the maternal aunt of the decedent. Charles Walker, the maker of the note, was a lawyer, who was a native of New Hampshire, but formerly practised law in the city of New York. He made a will, dated June 21, 1843, by which he gave several specific legacies, and directed the residue of his estate to be divided into five equal parts, and to be equally divided among his brother Augustus, his brother Timothy, his sister Susan B. Pickering, C. W. Morse, Susan W. Lind and Joseph E. Morse. Augustus Greele, Sidney E. Morse and the defendant, all of New York, were named executors. Charles Walker died of consumption, unmarried, at Concord, New Hampshire, on the first of October, 1843, (Sunday.) He had sent on to New York for his will, intending to alter it, and insert the $5000 for Mrs. Parker as a legacy, but it did not come. He said to Mrs. Parker that he would give her a note, which would obviate the difficulty; "which would be a debt, and would be paid before legacies; and

this," he said, "would answer quite as well as if it was in the will." He gave her the note for $5000 the day before his death.

Caroline Greely, widow of Augustus Greely, testified that Mr. Walker had the greatest affection for Mrs. Parker; he always spoke of her in warm terms. He confessed to the witness his grateful sense of Mrs. Parker's kind attentions. He was afraid he should wear her out, and spoke of the consolation it was to him to have the power of leaving her comfortable, to repay her for all her kindness. Mrs. Parker was his only nurse. When he spoke of repaying her for her kindness, he said that he should place the legacy in such form that she would get it immediately after his death. He said, I cannot make her rich, but have the means of making her comfortable for the rest of her life.

Arthur Fletcher, of Concord, New Hampshire, attorney and counsellor at law, testified that he was consulted personally by Charles Walker. Saw him several times a day, almost daily, during the three months that he was at Concord. He retained to the last the full exercise of all his mental faculties. On the 29th of September, he was sent for by Mr. Walker; and witness says, "I had a conversation with him as to providing for Mrs. Parker. He told me to bring his memorandum book from a small secretary in the room. He took from it two papers, one was the $300 note, which he showed me. Did not examine the other paper, which he held in his own hand. I saw on the top, in figures, $5000. He held the paper in his hand apparently for reference. He expressed regret that his will had not come on, but said he could perhaps do something to accomplish his object: that it had been his father's design to provide suitably for Mrs. Parker, but he made no will, and failed to fulfil his purpose; that he now entertained the same purpose, and that he wished to carry it into execution. Holding the paper in his hand, he directed me to write as he should dictate; and told me to write September 20, 1843, and write a note for $5000, payable to Mrs. S. P. or order, on demand, with interest." Witness wrote the note for $5000 precisely as dictated, and C. W. signed it in his presence. Being asked if he should affix a seal, C. W. said "No; his executors were not quibbling yankees. When the note should be presented they would understand his wishes, and would see that those wishes were executed." He remarked that the company and care of his aunt Parker had been of great comfort to him. She had acted as a mother; and he said that he intended to reward her liberally for her kindness, attention and services. Mrs. Parker came in and witness went out. C. W. was then lying on the sofa, with the note in his hand. He did not see

it delivered. In the course of the morning the witness came in again, and C. W. said "he felt weak, but relieved by what he had done in the morning." He died on Sunday, before one o'clock. On the morning of his decease, soon after breakfast, examined the memorandum book referred to, and his other effects. The notes were not there.

The assets in the defendant's hands were admitted to be sufficient to pay the claim in this suit, and all the legatees, except the residuary legatees. The judge decided that the $5000 note was valid as a *donatio mortis causa*, to which decision the defendant's counsel excepted. A verdict was then taken for $5,864 95, amount of both notes, subject to the opinion of the court on this case, with liberty to turn the same into a bill of exceptions or a special verdict; the plaintiff to have a new trial on the question of consideration, if the $5000 note should be held invalid as a *donatio mortis causa*.

The cause was argued at the January term of the superior court by *Theodore Sedgwick* for the plaintiff, and *Charles O'Conor* and *William Emerson* for the defendant.

Points for the plaintiff: 1. The plaintiff's claim is, in every point of view, most meritorious. It is conclusively proved that the decedent was in full possession of his faculties up to the time of his death, and that the five thousand dollar note was delivered to the plaintiff voluntarily and without any undue influence whatever. 2. It is equally well established that the plaintiff rendered to the deceased the most valuable services — services which, under the circumstances of the case, no other person could have performed. The testimony on both these points is furnished in great part by disinterested witnesses examined by the defendant himself, but whose testimony he did not see fit to read. 3. Mrs. Parker's admissions are to be taken precisely as she made them; and the fair inference from all the testimony is, that the five thousand dollar note was made and delivered by Charles Walker, in consideration of the actual services of the plaintiff; that the decedent having failed in his effort to obtain his will, being a professional man, and desiring to avoid all difficulty, intended to recognize and to create a *debt* which would, independent of all other questions, give immediate validity to the note, and, in his own language, require it to be paid before legacies. If so, the decedent had a right to value those services as highly as he pleased, and no question arises as to the law of gifts *mortis causa*. 4. If, however, the five thousand dollar note is to be regarded as a *donatio mortis causa*, still it is entirely

valid. Whatever doubt may exist in England or in our sister States, it is conclusively settled in New York, that the decedent's own promissory note, delivered in contemplation of death, without any undue influence, and where the party is in full possession of his faculties, is a valid subject of a gift *causa mortis*. That is this case.

Points for the defendant: I. The note for $5000 is *nudum pactum*, and therefore no cause of action could arise from it. It was, in fact, an ineffectual attempt to make a *donatio causa mortis*. *Tate* v. *Hilbert*, (4 Brown's Ch. R. 286; 2 Vesey, Jr. 120, S. C.); *Miller* v. *Miller*, (3 P. Wms. 375); Chitty on Bills, 2; Byles on Bills, 99; Lovelass on Wills, 336; *Fink* v. *Cox*, (18 Johns. R. 145); *Wright* v. *Wright*, (1 Cow. R. 598); *Coutant* v. *Schuyler*, 1 Paige's R. 316); *Raymond* v. *Selleck*, (10 Conn. R. 480); *Parish* v. *Stone*, (14 Pick. 198); *Copp* v. *Sawyer*, (6 N. H. Rep. 386); *Pennington* v. *Patterson*, (2 Gill & Johns. 216); *Holliday* v. *Atkinson*, (5 Barn. & Cr. 501); S. C. 8 D. & R. 163. The alleged services of the plaintiff were a voluntary courtesy, such as friends usually render to each other; and consequently no request to perform or promise to pay for them could be implied in law. Without such implication, these alleged services do not create a debt to any extent. *Pearson* v. *Pearson*, (7 J. R. 26); *Noble* v. *Smith*, (2 J. R. 52); *Parish* v. *Stone*, *ut supra*. II. If it can be maintained by any view of the evidence that the alleged services constituted a ground of indebtedness, then such indebtedness did not exceed eight or nine dollars, and the recovery should be limited to that amount. *Parish* v. *Stone*, *ut supra*. III. The judgment of the court should be for the plaintiff, for the amount of the principal and interest of the three hundred dollar note, without costs.

Vanderpœl, J. The only question in this case is, whether the note for $5000, given by Charles Walker to the plaintiff on the 20th of September, 1843, is valid as a *donatio causa mortis*. A faint effort was made at the trial to prove something like a valuable consideration, in the form of services rendered by the plaintiff to the decedent in his last illness; but such was the disparity between the amount of the note and the actual value of these services, that they were not urged on the argument as a sufficient aliment to sustain the note. The only point now insisted upon on behalf of the plaintiff is, that the delivery of this note to her under the circumstances which attended the making and delivery of it, was a good *donatio causa mortis*.

These donations *causa mortis* were introduced into the common law from the civil law, and I have, nowhere, been able to find a more clear or precise definition of them than is to be found in Cooper's Justinian, page 100. A *donatio mortis causa*, says Justinian, is made under apprehension of death, as where anything is given upon condition that if the donor dies, the donee shall possess it absolutely, or return it, if the donor should survive or should repent of having made the gift; or if the donee should die before the donor. In short, a *donatio mortis causa* is said to be made, when a man so gives as to demonstrate that he would rather possess the thing given himself, than that the donee should possess it; and yet that the donee should possess it, rather than his own heir.

As Chancellor Kent well remarks (2 Kent's Com. 447), the cases do not seem to be entirely reconcilable on the subject of donations of choses in action. In *Bailey* v. *Snedgrove*, decided by Lord Hardwicke in 1744, he held that a bond was a good donation *mortis causa*, and took a distinction between the delivery of a bond and a note. A bond, he says, is a specialty, is the foundation of the action, the destruction of which destroys the demand; whereas a delivery of a note, payable to bearer, is only *evidence* of the contract. This distinction has not been adhered to in this state. Several other states have also repudiated it as unsound, and in this state at least it may be said that bonds, bills of exchange, promissory notes, and other choses in action are all equally proper subjects of a valid donation *causa mortis*, as *inter vivos*, (4 Kent's Com. 447); *Wright* v. *Wright*, (1 Cowen, 598); *Coutant* v. *Schuyler*, (1 Paige, 318); *Barneman* v. *Sedlinger*, (15 Maine, 429); *Mills* v. *Tucker*, (3 Binney, 366.) In *Wright* v. *Wright*, (1 Cowen, 598,) it was expressly held, that a promissory note executed by a testator in his last sickness and delivered to the payee, without consideration, but in expectation of dissolution, is valid as a donation *causa mortis*. Although it is urged, that there, the question came up on a motion to overrule the order of a circuit judge refusing to stay proceedings in the case, yet the opinion of the court clearly indicates that they held the principle laid down there, with a full knowledge that the adjudged cases on this point were conflicting. If that case is to be regarded as authoritative, and we cannot perceive how we can esteem it otherwise until it is overruled by the same court which pronounced it, or by the court of last resort, then there is an end of this case. Mr. Walker's note to the plaintiff, given with the emphatic declaration with which, and the laudable purpose for which, it was given, must be held to be good and binding as against his representatives. The case of *Wright* v.

Wright, so far from being overruled or doubted, has been recognized as authority by Chancellor Walworth, in *Coutant* v. *Schuyler*, (1 Paige, 318.) The learned chancellor there says, that, notwithstanding the attempts which have been made in England to distinguish between a promissory note and a bond, in relation to the validity of the gift of a chose in action, there cannot in reason be any difference. A gift of either is valid, as a symbolical delivery of the debt due on the note or bond, and all the delivery of which the subject is capable. The chancellor speaks with approbation of the doctrine held in *Wright* v. *Wright*.

I am aware that the opinion of our supreme court in *Wright* v. *Wright* was disregarded by the supreme court of Massachusetts in *Parish* v. *Stone*, (14 Pick. 148,) where it was expressly held that the donor's own note, payable to the donee, cannot be the subject of a *donatio causa mortis*. Shaw, chief justice, in an elaborate opinion, approves of the doctrine held by Lord Hardwicke, in *Ward* v. *Turner*, (2 Ves. sen. 431,) that a gift of South Sea annuities was not a good *donatio causa mortis*, and that, while the obligation bond, was a good subject for this species of gift, his own promissory note was not. The case of *Coutant* v. *Schuyler* in our own court of chancery was evidently overlooked by the learned judge; but had it fallen within his view, it is not probable that it would have changed the result in the case of *Parish* v. *Stone*. The supreme court of Massachusetts were evidently bent on following the English rule, which seems to this day to be, that a promissory note is not good as a *donatio causa mortis*. *Holliday* v. *Atkinson*, (5 Barn. & Cres. 501.) In the case of *Borneman* v. *Sedlinger*, (15 Maine Rep. 449,) the question came before the supreme court of Maine, whether a note and a mortgage given to secure the sum were legitimate subjects of a donation *causa mortis;* and it was held that when an intestate, in his last sickness, and in contemplation of death, gave to certain donees a note and mortgage, and actually delivered them, not to the donees, but to a third person, for their use, the gift was good as a *donatio causa mortis*. With this conflict of authorities in the different states, it could hardly, in the absence of any express adjudication in this state, be said that the law on this subject was well settled. The most that could then be urged is, that the English courts have uniformly followed Lord Hardwicke, in the case of *Wood* v. *Turner*, in holding, for reasons which are by no means cogent, that while a man's own bond is a good subject of this species of gift, his note is not; and that some of the states, Massachusetts and Connecticut in particular, have followed the English rule. As our supreme court and

court of chancery have rejected this distinction, and that, too, with a knowledge of the English rule, it can hardly be expected that this court will take the responsibility of deciding that the cases of *Wright* v. *Wright* and *Coutant* v. *Schuyler* were not duly considered. If the law, as pronounced by the courts of this state, is not sound, let the tribunals that promulgated the heresy overrule it.

It is true, that donations of this kind are and should be regarded with jealousy by courts. Justinian, fearful of fraud in these gifts, required them to be executed in the presence of five witnesses. This precaution is not required by the common law; but as they amount *pro tanto* to revocation of the written wills, and do not even require the forms prescribed for nuncupative wills, it is well that courts, before sustaining these gifts, should be satisfied that they were made with due deliberation, and that no improper influences operated upon the mind of the donor, when softened, if not weakened, by the near approach of death. This is a case in which no doubt can be entertained that the giving this note to the plaintiff was the deliberate act of Charles Walker, when, with death impending over him, his mind was still in full vigor. There are, indeed, few cases of wills where the intent to give and the necessary concomitants, of deliberation and sound mind, are more clearly proved than in this case; and it would be a subject of regret, if the law, in its severity, frustrated the very laudable intentions of the donor.

The note is good as a *donatio causa mortis*, and the plaintiff is entitled to recover.

Supreme Judicial Court, Maine, April Term, 1846, at Portland.[1]

McLellan *v.* Bank of Cumberland.

Malicious arrest; — Execution; — Surety; — Release; — Bond.

This was an action for a malicious arrest on execution. The first question which arose was, whether a corporation aggregate

[1] The supreme court of Maine closed its law term of two weeks on the 24th of April; on which occasion they delivered twenty-nine opinions in cases argued at that and the preceding April term. The court consisted of Chief Justice Whitman, Justices Shepley and Tenney. We furnish brief notes of some of these decisions on interesting points. Others will appear hereafter. — It is worthy of remark, that *two* cases, instituted by eminent counsel of this court, one of whom is since deceased, and strenuously urged and argued, were dismissed for want of sufficient ground of action, — another proof of an old adage, that a lawyer is not the safest counsellor in his own cause. — W.

can be charged with malice; which was not decided, as the cause went off on other grounds. The plaintiff was a surety on a cashier's bond given to the defendants. Two of the co-sureties paid a certain sum on another bond for the default of the same cashier, and took a writing, in which it was agreed that they should not be called on by the creditor for any portion of the execution on which the plaintiff in this action was arrested. It was contended that this settlement between the creditor and the co-sureties discharged the execution, and that the arrest was therefore without probable cause and malicious. But the court decided that the facts proved were not a discharge of the execution; and the plaintiff was nonsuited.

Appleton, Executor, *v.* Horton.

Equity; — Conveyance of land; — Representations of respondent's obligee to vendee.

This was a bill in equity to rescind a contract for the sale of wild land, on the ground of fraud in the representation of the character of the tract. The respondent bonded the land to third persons, who received a conveyance of it, and sold it to the plaintiff's testator. No representations were made by the respondent to the testator, nor did any communication pass between them. Part of the notes given for the purchase by the testator were turned over to the respondent; and it was sought to charge him, on the ground that those who made the conveyance to the testator were the respondent's agents. This position, however, was not sustained, and the bill was dismissed with costs.

Smith *v.* Smith.

Replevin; — Mortgage; — Delivery; — Attachment; — Demand.

Replevin for furniture mortgaged to the plaintiff, attached by the defendant. The court decided, 1. That a delivery is not necessary to the validity of a mortgage of *personal* property, duly recorded; 2. That a demand on the officer attaching the property is not required, by law, previous to commencing the action.

Digest of American Cases.

Selections from 12 New Hampshire Reports. (Continued from page 39.)

EVIDENCE.

13. Memoranda upon a plan, that certain persons desired to purchase one of the lots, and to whom and when it was sold, but not varying the courses and distances of the lines of the lots, nor the relative situations of the lots to each other, are not an alteration of the plan. *Morrill* v. *Otis*, 466.

14. If such memoranda were made with intent to deceive any person, whether they would render the plan incompetent as evidence, *quære? Ib.*

15. The plaintiff offered in evidence his book of accounts, with his suppletory oath; but, on his cross-examination, it appearing in evidence that the articles charged were delivered by a third person, the book was rejected by the court. In the course of his cross-examination, he was inquired of by the defendant's counsel touching the case generally. *Held*, that the plaintiff's counsel, although the book had been rejected, might examine him in explanation of his evidence, relating to the case generally, and that his testimony might be considered by the jury, in connection with the other evidence in the case. *McIlvaine* v. *Wilkins*, 474.

16. The account books of a party, verified by his oath, are not evidence, except of charges by the creditor against the debtor, when they stand to each other in the relation of plaintiff and defendant. *Woodes* v. *Dennett*, 510.

17. They are not evidence where the dealing between the debtor and creditor is, as to the parties to the suit, a mere collateral matter. *Ib.*

18. In an action upon an agreement by the defendant to pay the plaintiff for articles delivered to one Pickering, the defendant offered evidence that Pickering had paid the plaintiff therefor by his labor. To rebut this evidence, the plaintiff offered his book of accounts, verified by his oath, containing charges against Pickering while he was in the employ of the plaintiff. *Held*, that the book was inadmissible. *Ib.*

19. A grantor may be a witness to show that his deed is invalid, even for fraud, if he have no interest in the case. The weight of his testimony, if he swear to his own turpitude, is to be considered by the jury. *Stevenson* v. *Chapman*, 524.

EXTENT.

1. Where a judgment creditor, who has caused his execution to be extended on the land of his debtor, brings an action of debt upon his judgment, under the statute of July 4, 1829, and recovers a new judgment, (or, in case the judgment debtor has died, obtains an allowance of the original judgment, as a claim against his estate,) upon the ground that the debtor had no title to the property upon which the levy was made, the proceedings under the levy are avoided, and he cannot afterwards set up a title to the property under it. *Barker* v. *Wendell*, 119.

2. So, if the levy is upon an equity of redemption, which is sold upon the execution, and he himself becomes the purchaser of it. *Ib.*

3. Where, after a levy upon an execution, the judgment creditor brings an action founded upon it, to recover the property levied on, and judgment is rendered against him, he may bring his action of debt, or present his claim against the estate, if the debtor is dead, without prosecuting a review of the action in which he has failed. Or, he may review the action thus brought, and, if he fails on the review, seek his

remedy afterwards, on his first judgment, in an action of debt, under the statute, on account of the failure of the title. *Ib.*

4. But he cannot, after judgment against him in the action founded on the levy, maintain an action of debt, or have an allowance of a claim against the estate of the debtor, upon the ground of a failure of the title, and, at the same time, reserve a right to prosecute a review. *S. C.* 120.

5. Nor will a subsequent release of the amount recovered or allowed, restore or continue the right to claim the property under the levy of the execution. *Ib.*

6. Land extended upon by an execution is sufficiently set out by metes and bounds, within the meaning of the statute, if it be described as bounded by the lands of other persons, provided its situation can be ascertained. *McConihe* v. *Sawyer*, 397.

7. Where the interest of a husband in land, assigned to his wife as dower, is taken in execution, the annual value of the land should be appraised, and the land set off to the creditor, to hold for a sufficient time to satisfy the judgment, if the wife should live so long. *Ib.*

8. But, where the appraisers estimated the land to be worth fifty dollars per year, and the officer returned the execution satisfied for that sum, and that he had set off the land by metes and bounds — *Held*, that the creditor was entitled to the possession of the land for one year from the date of the return of the *levari facias*. *Ib.*

9. In such case, the quantity of estate should be so limited in the return, that the creditor should hold the land for one year only, provided the tenant for life should live so long. *Ib.*

FIXTURES.

1. The strict rule as to fixtures, that prevails between heir and executor, applies as between vendee and vendor, and between mortgagee and mortgagor. *Despatch Line of Packets* v. *Bellamy Man. Co. & Trustees*, 205.

2. Machines, and other articles essential to the occupation of a building, or to the business carried on in it, and which are affixed or fastened to the freehold, and used with it, partake of the character of real estate, become part of it, and pass by a conveyance of the land. *S. C.* 206.

3. An engine used in a building, and which cannot be removed without taking down part of the building, is a fixture. *Ib.*

4. Loose, movable machinery, not attached nor affixed, where it is used in prosecuting any business to which the freehold property is adapted, is not regarded as part of the real estate, or as an appurtenance to it. *Ib.*

FOREIGN ATTACHMENT.

1. Where the principal debtor had agreed to work with the trustee, on condition that the trustee should pay the amount of his wages to a third person, to whom he was indebted — *Held*, that the wages so received in the hands of the trustee were not subject to attachment by trustee process. *White* v. *Richardson & Trustee*, 93.

2. Where the trustee had become bail for another, on condition that he should work for the trustee, and the wages should remain in the trustee's hands, to indemnify him for his liability — *Held*, that the contract could not be overruled by trustee process, and that the amount received on such contract must be first applied in payment of the sum for which he might be charged as bail. *Ib.*

3. Where a party, in order to secure a just debt, takes an absolute conveyance of personal property, and a creditor summons the vendee as trustee of the vendor, fraud is not to be inferred, conclusively, from the form of the conveyance alone; and, unless there are other circumstances, showing an express design to delay or defeat creditors, the trustee must be discharged, if the plaintiff does not pay or tender the debt. The principle of the case (*Coburn* v. *Pickering*, 3 N. H. Rep. 415) is not applicable where the creditor summons the vendee as trustee of the vendor. *Boardman* v. *Cushing & Trustees*, 105.

4. A trustee, where there is no fraud, has a right to set off, or retain, for all demands due him from the principal, contracted before the service of the process, and payable at the time of the judgment. *S. C.* 106.

5. Where a trustee, in his disclosure, admits himself to be indebted to the

principal debtor on account, he must be charged, unless he shows himself clearly discharged, upon evidence of as high a nature as that furnished by the disclosure of the trustee of facts known to himself. *Giddings* v. *Coleman & Trustee*, 153.

6. Accordingly, where, in the disclosure, the indebtedness of the trustee to the principal debtor on account was admitted, and it was also stated in the disclosure that the agent of certain persons, claiming to be the assignees of the principal debtor, had informed the trustee of the fact of the assignment of a portion of said account to them, and had presented to him instruments of assignment in writing, purporting to be executed by the principal debtor to said assignees; but it appeared that the trustee had no other knowledge of the fact of the assignment than what was derived from the statement of the agent, and the exhibition of the instruments of assignment; it was *held*, that the trustee was, nevertheless, chargeable, inasmuch as the evidence furnished by the disclosure, to show the fact of the validity of the assignment, was mere hearsay evidence, and, therefore, not competent for that purpose. *S. C.* 154.

7. It is the duty of the assignees of choses in action, who would protect their interest in the claims assigned, in case the debtor is sued as the trustee of the assignor, and is not possessed of the requisite knowledge of the facts essential to his discharge, upon proper notice, to furnish to the trustee competent evidence of the assignment of the claims; otherwise the trustee will be charged, and the claim of the assignees will be regarded as waived or abandoned. *Ib.*

8. The affidavits of disinterested persons, appended to, and made parcel of, the disclosure of a trustee, stating facts within the knowledge of those making the affidavits, furnish competent evidence to be considered by the court, in connection with the disclosure, upon the question of the liability of the trustee. *Ib.*

9. If one summoned as trustee has in his hands the goods of the principal, he has a right to hold them to answer upon the process; and, if they are taken from his possession by a wrongdoer, that will not discharge him as trustee. But it may furnish ground for delaying the proceedings, until damages can be recovered. *Despatch Line of Packets* v. *Bellamy Man. Co. & Trustees*, 206.

10. A party who obtains the possession of goods by a trespass, cannot be charged as trustee of the owner, to whom the wrong is done. *Ib.*

11. S. held a contract, upon which certain money was to be received for the benefit of L. & H., who were partners. L. & H. ordered the money, when received, to be paid over to A. L., to whom the partnership was indebted; and L., a surviving partner, after the death of H., made a formal assignment of the money to A. L., to be appropriated to the payment of his demands against the partnership. After this, S. received the money, at different times, and paid it over to A. L. The plaintiff in the mean time summoned S. and A. L., as trustees of L. & H. *Held*, that A. L. was entitled to so much of the money as would satisfy his demands against the partnership; but that he was not entitled to retain for the private debt of L., the surviving partner, nor for the debts of other creditors of L. & H., to whom, without any authority, he had said that, if there was any balance in his hands, he would pay the debts. *Held*, also, that, under these circumstances, S. ought to be discharged, and A. L. charged as trustee. *French* v. *Lovejoy & Trustee*, 458.

HUSBAND AND WIFE.

1. Where a married woman pays, from her separate property, part of the consideration money for the purchase of land, and a conveyance of the land is made to her with the assent of her husband, her title to the land is good against all persons but the creditors of her husband. *Marshall* v. *Pierce*, 128.

2. A husband may refuse to reduce a legacy to his wife into his possession, and permit her to hold it for her separate use; and, if he do so, *it seems* that his creditors cannot attach it, by trustee process or otherwise, for the payment of his debts. *Marston* v. *Carter & Trustee*, 159.

INFANCY.

1. An indenture of apprenticeship of an infant is not binding upon him, un-

less his consent be expressed in the indenture. *Balch* v. *Smith*, 438.

2. Where the testamentary guardians of an infant, by indenture, covenanted with the defendant that the infant should labor for him until he should become of age, and the defendant covenanted to pay the plaintiffs the sum of one hundred and fifty dollars, and the infant labored for the defendant the time specified in the indenture, without objection, and assented to and ratified the indenture on becoming of age — it was *held*, that, although the powers and duties of the guardians were not assignable, yet, as the covenant of the plaintiffs had been fulfilled, and they were entitled to the infant's services by the will, and nothing remained for the defendant but to pay the money, it might be recovered of him by an action on the covenant. *Held*, also, that the payment of the money by the defendant to the infant did not discharge him from his liability to the plaintiffs. *Ib.*

3. Where the will provided that, if the infant should refuse to render labor and obedience to his brothers, the residuary legatees, a deduction should be made from his legacy, and the infant labored for the defendant by request of his brothers, and, when he became of age, accepted the full amount of the legacy — *Held*, that such acceptance was a ratification of the agreement between the defendant and the brothers of the infant, and estopped the infant from asserting any claim for compensation for services. *Ib.*

4. Whether, if he had not accepted the full amount of the legacy, he might have recovered compensation for his services of the defendant, *quære? Ib.*

5. In a suit against an infant, if he do not appear and nominate a guardian, the court, on motion by the plaintiff, will appoint a guardian *ad litem* for the infant. *Clarke* v. *Gilmanton*, 515.

6. Where a committee, appointed by the court of common pleas, upon a petition for a highway, made a report laying out the highway over the land of infants, who did not appear, it was *held*, that the court might, upon motion by the petitioners, appoint a guardian *ad litem* for the infants, upon whom legal notice might be served of the time and place for hearing the owners of the land. *Ib.*

7. A notice served upon the infants, of the time and place for hearing the land owners, is sufficient. *Ib.*

INSANITY.

1. Selectmen and overseers of the poor have not, *ex officio*, any right to control and restrain the person of a lunatic. *Colby* v. *Jackson*, 526.

2. If a person be so insane that it would be dangerous to suffer him to be at liberty, any person may, from the necessity of the case, without warrant, confine him for a reasonable time, until proper proceedings can be had for the appointment of a guardian. *Ib.*

3. No one has a right to confine an insane person for an indefinite period, until he shall be restored to reason, but under the sanctions, and upon compliance with the formalities, of the law. *Ib.*

4. If it be dangerous to permit an insane person to be at liberty, and he be confined, and, before measures can be taken for the appointment of a guardian, he become sane, and be released, the party confining him will not be a trespasser. *Ib.*

5. The plaintiff being insane, and it being dangerous to permit him to be at liberty, the defendant, one of the selectmen of the town, confined him. He then, with the other selectmen, applied to the judge of probate for an inquisition upon the plaintiff. A warrant was issued, and the selectmen made an inquisition, and declared their opinion to be that the plaintiff was insane; but made no return of the inquisition to the judge of probate, and no further proceedings were had; but the defendant still kept him in confinement. *Held*, that he was a trespasser *ab initio*. *Ib.*

6. In trespass for imprisoning the plaintiff, who was then insane, the defendant may show, in mitigation of damages, that he made inquiry, whether it would be safe to permit the plaintiff to be at liberty, and was told by the plaintiff's friends and neighbors that it would not; and that he seemed desirous to take the best course for the plaintiff and his family. *Ib.*

JURISDICTION.

1. A writ of habeas corpus, issuing under the authority of this state, may be executed within the limits of the land ceded by the state to the United

States for the purpose of a fort and lighthouse, by virtue of the proviso in the act of cession. *The State* v. *Dimick*, 194.

2. A return to a habeas corpus, setting forth that the petitioner is held as a soldier, under an enlistment in the army of the United States, does not oust this court of its jurisdiction; but it is bound to inquire whether the petitioner is lawfully held under the laws of the United States; and, if not, he is entitled to a discharge. *Ib.*

MORTGAGE.

1. If there be two mortgages upon land, neither of the mortgagees having entered, and the mortgagor, without the assent of either of them, cut timber upon the land, after which the first mortgage is discharged, the second mortgagee may maintain trespass *quare clausum fregit*, for the cutting of the timber. *Sanders* v. *Reed*, 558.

2. C., being the owner of a tract of land, mortgaged the same to R., and then conveyed the land to T., taking back a mortgage from him, to secure the purchase-money, which he assigned to S. After this, T. remaining in possession, another person cut timber upon the land, under a license from him, without the assent of either of the mortgagees, and subsequently the debt due to R. was paid. *Held*, that S., the assignee of the second mortgage, might maintain trespass *quare clausum fregit* against the party who cut the timber. *Ib.*

MORTGAGE OF PERSONAL PROPERTY.

1. Where a mortgage of personal property was intrusted by the mortgagee to the mortgagor, who left it with the town clerk, with instructions to "keep it out of sight for a few days," which request was assented to by the clerk — *Held*, that the clerk had no authority to place it on record till such instructions were withdrawn. *Low* v. *Pettengill*, 337.

2. Where an attachment of the property was made in the mean time, as the property of the mortgagor — *Held*, that the attachment was valid. *Ib.*

3. A mere declaration, by a mortgagee of personal property, on learning from the mortgagor that he had sold it, that he cared nothing about the property, and did not want it, does not preclude him from afterwards asserting his title under the mortgage. *White* v. *Phelps*, 382.

4. If a mortgagor of personal property, or any one claiming under him, sell the entire property, as owner, in exclusion of the rights of the mortgagee, such sale is a conversion, and the mortgagee may maintain trover. *Ib.*

PARTNERSHIP.

1. Stage companies are, ordinarily, associations, with liabilities as partners; and the share of any individual member in the surplus of the company's property may be holden by attachment at law, so as to avail to the benefit of his creditors. *Dow* v. *Sayward*, 271.

2. An assignment of partnership property, for the security and payment of the creditor of an individual partner, is invalid against the partnership creditors. *French* v. *Lovejoy & Trustee*, 458.

PRACTICE.

1. Where a verdict is manifestly too large, and the excess is readily ascertainable by mere arithmetical computation, such excess may be remitted; and, after its remission, it will furnish no ground for setting aside the verdict and granting a new trial. *Sanborn* v. *Emerson*, 58.

2. The court will not set aside a verdict, as against the evidence in a cause, merely because they might, upon an examination of the evidence, have arrived at a result different from that found by the jury. *Wendell* v. *Safford*, 171.

3. Nor will they set it aside upon this ground, where the credibility of witnesses is to be considered, presumptions are to be raised, and inferences to be made, and where the nature of the evidence is such that different persons might reasonably have different impressions concerning it. *Ib.*

4. But, where it is apparent that the jury must have misunderstood, or totally disregarded, the instructions of the court upon the evidence, or must have neglected properly to consider the facts, and must have overlooked prominent and essential points in the evidence, so that substantial justice has not been done, the verdict will be set aside. *Ib.*

5. Where a writ is not properly indorsed before service, the court have no authority to permit the same to be

subsequently indorsed, without the assent of the defendant. *Pettengill* v. *McGregor*, 180.

6. But, where a writ is properly indorsed before service, it is the uniform practice, in this state, and the court are fully authorized, to permit any such change of indorsers as, in their judgment, the exigency of the case, or as justice, may seem to require. *Ib.*

7. By the practice in this state, when a default is entered, the court assess the damages, unless, for special reasons, it be deemed expedient to order an inquiry of damages by the jury. If one defendant be defaulted, and another plead, the jury, if they find for the plaintiff, assess damages, for which judgment is rendered against all. *Bowman* v. *Noyes*, 302.

8. If an objection on account of variance between the declaration and the proof be not taken at the trial, it will be considered as waived. *McConihe* v. *Sawyer*, 397.

9. It is not proper practice that evidence should be admitted on trial, subject to exceptions, without a statement of the exceptions at the time; and the court will not, in such case, set aside a verdict on account of a formal objection, although the evidence was thus admitted by consent of the parties. *Ib.*

10. The plaintiff declared in trespass upon a statute, to recover certain penalties for cutting trees upon his land. *Held*, that an amendment, inserting a general count for breaking the close and cutting the trees, changed the cause of action, and was therefore inadmissible. *Melvin* v. *Smith*, 462.

11. An appearance to an action, by an attorney of the court where it is pending, is presumed to have been regularly made, until the contrary is shown. *Leavitt* v. *Wallace*, 490.

12. If the admission of an amendment is within the discretion of the court, the propriety of its allowance cannot be reëxamined, after the amendment is admitted, upon an objection taken at the trial of the action. *Perley* v. *Brown*, 493.

SET-OFF.

1. A judgment recovered by A. against B. and C. may be set off against a judgment recovered by B. against A. *Hutchins* v. *Riddle*, 464.

2. And the court may, in its discretion, stay the entry of judgment in the action in favor of B. against A., to enable the latter to obtain a judgment on his demand against B. and C., for the purpose of making the set-off. *Ib.*

SHERIFF.

1. Where a sheriff merely knows that property in the possession of a debtor has been attached, such knowledge will not prevent him from making a valid attachment. *Young* v. *Walker*, 502.

2. But, if he know that there is a subsisting attachment, and an unrescinded contract of bailment of the property, by another sheriff, and that the property is used by the debtor merely for his temporary convenience, he cannot attach it. *Ib.*

TENANTS IN COMMON.

A tree, standing directly upon the line between adjoining owners, so that the line passes through it, is the common property of both parties, whether marked or not; and trespass will lie if one cuts and destroys it without the consent of the other. *Griffin* v. *Bixby*, 454.

TOWNS.

1. Towns may bind themselves by vote to indemnify a collector of taxes from the costs and expenses of defending actions brought against him, for acts done in the performance of his duties. *Pike* v. *Middleton*, 278.

2. And selectmen may bind a town to the same extent, under the fourth section of the act of the 28th of June, 1827, which provides that they "shall have the ordering and managing of all the prudential affairs of the town." *Ib.*

3. An unincorporated place cannot, by its own acts only, place itself in such a position as to entitle itself to the rights and privileges, or subject itself to the liabilities, of towns. *New-Boston* v. *Dunbarton*, 409.

4. But evidence that the inhabitants of a particular place have exercised the rights, and performed the duties, of a town corporation, and that it has been recognized as such, may be submitted to a jury on which to find an incorporation in fact. *Ib.*

Notices of New Books.

A Treatise on the Limitations of Actions at Law and Suits in Equity and Admiralty; with an Appendix containing the American and English Statutes of Limitations, and embracing the latest Acts on the Subject. By J. K. Angell. Second edition: revised, corrected, and much enlarged. Boston: Little & Brown, 1846. pp. 707.

In a notice of the first edition of Mr. Angell's book, in the American Jurist, Vol. V. p. 63, by the late Professor Ashmun, we find the following passage; "It is somewhat surprising, that, amidst the swarm of treatises, essays, and summaries on English law, no writer of any pretensions should have taken up this subject, [the statutes of limitations.] The only separate work that has found its way among the American bar, is that of Ballentine, a paltry catchpenny, published in 1810, and republished in 1812, as embellished 'with references to American decisions,' which, on careful computation, are found to be just *seventy-one* in number. A similar work, published during the last year, (1829,) in England, is no better, and in no one of the digests, abridgments, or other books of reference, was to be found any tolerable collection or index of the reported cases. The work of Mr. Angell supplies, in a great measure, the deficiency. It is a faithful and minute investigation of the subject in all its branches, and as a means of ready reference will be found quite indispensable to the library of every gentleman of the profession."

These remarks upon the English treatises on the statutes of limitations, which were then published, are equally true, so far as we are aware, of all the English books published since. A new book, therefore, on this subject had become a desideratum. For, in consequence of the change introduced into the English and American law by recent statutes, a new class of cases has arisen, and numerous decisions have been made, which are of great practical importance to the profession. These decisions, and all others, on the matter of limitations, have been collected and arranged by Mr. Angell, so that the whole law on the subject down to the present year, may be found in his second edition, which, as he says in the preface, "is in all respects a new, as well as much enlarged work." A method of treating the subject, different from that in the first edition, has been adopted, which we deem an improvement.

We have no hesitation in expressing our judgment, that this work is the only one which does justice to the subject of limitations of actions; and that, as was said of the first edition, by a much better judge than ourselves, this second edition, "will be found quite indispensable to the library of every gentleman of the profession."

A Treatise on the Law of Evidence. By Simon Greenleaf, LL.D., Royall Professor of Law in Harvard University. Volume II. Boston: Little & Brown. London: Maxwell & Son. 1846. pp. 605.

Few American law books have been as *popular*, in a just sense of the term, as the first volume of Mr. Greenleaf's Treatise on Evidence; and certainly no single work in our profession has won for its author so much distinction, both at home and abroad. The second volume, now published, does no discredit to its companion, and is equally remarkable for those capital requisites of a good law book—clear and concise statement of the points, a crystal purity of style, and a careful exclusion of all discussions, suggestions and insinuations which have no immediate reference to the matter in hand, and which serve to cover up the law, so that it is about as difficult to get at the true doctrine of the cases as it would be to catch a particular fish on the banks of Newfoundland.

Intelligence and Miscellany.

Chief Justice Parsons. — It has long been a subject of regret with the profession, that a biography of this distinguished judge has not been written by some person competent to the task. The personal history of few public men, in our country, would be more interesting and encouraging to the young, and as a public character, as a learned jurist, a firm, consistent and able judge, his name will live as long as the principles of our jurisprudence. Perhaps the best biographical sketch of Chief Justice Parsons is by his successor, the late Chief Justice Parker, printed in the tenth volume of the Massachusetts Reports. The substance of this sketch was printed in the American Law Magazine, in October, 1844, to which the following note, drawn up at the request of the editors, was appended. It bears internal evidence of having been prepared by a son of Mr. Parsons, who bears the name of his distinguished father.

"In one of the notes to the sketch, Judge Parker speaks of Chief Justice Parsons as 'shrinking from an eastern breeze,' and 'starting on the slightest pain;' and this has given to many readers the impression that he was a mere hypochondriac. But it was not so intended. His health was never good. When beginning to practise his profession, he was supposed to be sinking into a consumption. He bled from the lungs, and was very feeble. He has been heard to attribute his recovery to much exercise on horseback; his disease undoubtedly arose from intemperate study, and as soon as riding had restored his health so far that he could return to his books, he gave up his exercise and never resumed it. There is a portrait of him in the possession of his son (Theophilus Parsons, Esq.) painted soon after that period; and it represents him as thin, pale, and sickly. When about forty years old, he began to grow fleshy; became a very large and heavy man; in height he was something more than six feet. But his health was never good. He had always complaints which were liable to recur at any moment, and cause much distress. During his last years, he was troubled with a disease of the heart, of which the most prominent and frequent symptom was a palpitation, which at times rendered him unable to attend to any business or study. He had also one attack, which was supposed to be paralysis: but he recovered from it entirely. His last illness was hydrocephalic apoplexy. It came on gradually; and through it he appeared perfectly self-possessed and tranquil; and he made the necesary arrangements of his property, and otherwise prepared for death, with perfect clearness and calmness. From one remark of Judge Parker's, it has been supposed that he left but little property; his indifference to accumulation and the expenses of a large family, prevented his becoming what many would call rich; but he left between eighty and ninety thousand dollars.

His habits were not favorable to health. Though no epicure, and indeed always preferring the plainest food, he indulged his appetite freely, and took almost no exercise. When not engaged abroad in his duties as chief justice, he sat in his study or the family parlor, occupied with his books and papers, from twelve to fifteen hours of every day. He had no occupations to call him out of the house. Even before he went on the bench, his office was in his dwelling-house — a thing most unusual in Boston, and the more noticeable because he lived at a considerable distance from the centre of business; and there clients who wanted him must go to find him. He was fond of smoking, and for a considerable period was seldom without a cigar in his mouth, in any part of the day when at home. But some years before his death he abstained entirely, believing that smoking increased the palpitation under which he labored.

Something is said by Judge Parker of his knowledge of Greek. There is in existence a manuscript grammar which

he began to make, because there was then no grammar of that language in English; but before it was completed, the Gloucester Greek Grammar was published, and he laid his aside. He had in his library books in Hebrew, French, and Italian, which he occasionally read, but it is not known how well he knew those languages. Besides a very large and valuable library, he had a collection of astronomical and scientific instruments, imported for him by his intimate friend, the late Doct. Prince, of Salem. It was considered the best then possessed by any private person, and he made frequent use of them.

He left an immense mass of manuscripts; but none intended for the press. The greater part were on legal subjects; almost as many, however, were mathematical; and there were some on various topics of religion, philosophy, and science. He has been heard to say, that after he had been studying any particular subject, he liked to write upon it, for the purpose of giving precision and clearness to his thoughts; but he was unwilling to publish, and resisted many requests of this kind. Nor was it only in his unwillingness to print his writings, that he manifested his dislike for publicity. He carried his indifference to everything like popularity and fame so far, that he seemed to have for it a positive dislike and contempt. Devoted to his family, his studies, and the duties of his office — instead of seeking opportunities for coming before the public, he shrank from occasions of this kind, with more than a slight unwillingness. He was often requested to furnish facts and anecdotes which might be worked into a biography, but constantly refused. In the same spirit, he was never willing to have his portrait painted. That which has been alluded to was made for his father, when he was a young man; and the portraits of him which are now common, are copied from a painting executed by the late Gilbert Stuart, from memory, after his death.

Perhaps no trait of his character was more noticeable than his love for his family. In all his tastes and habits he was thoroughly domestic. It is the recollection of one who had seen him in all kinds of society, that he never appeared so happy as when, in an evening, his large family were gathered about him. He entered into all their enjoyments, and increased them by his active sympathy. He was fond of mechanical employments, and had a large collection of tools, with which he often amused himself, and would leave the gravest study to make a plaything for his boys, or show them how to make one. There never was a man who better loved his home. So amiable and excellent a wife, indeed, could not fail to render that home attractive to him. Upon her rested the whole care and control of the household; and it was her constant and successful endeavor so to order her domestic economy, that at every moment, and in all its details, it should be subservient to his comfort and his wishes. They lived together more than thirty years; and during this long period, there never was one hour's interruption to the delightful harmony which filled their home with happiness and peace.

Prison Discipline. — At the recent meeting of the Prison Discipline Society, in Boston, Mr. Charles Sumner, an officer of the society, made an able and eloquent speech in defence of the Pennsylvania or separate system of prison discipline. He awarded much credit to the Boston society and its secretary, for the good they had accomplished, but condemned the unilateral and partisan character of the reports in favor of the Auburn, or congregate system. He asked if their character had not been injured from this want of candor? This was his fear, and he was compelled to introduce evidence of a character which he would gladly suppress, but which, as a member of the society he was bound to lay upon the table. This evidence would show, he thought, that the reports had lost all credence and authority within the last four years. He quoted first from official documents. The Pennsylvania overseer of prisons, in 1834, spoke of one of our reports as a "wilful and unwarrantable perversion of the truth." In 1836, they spoke of our reports as "false reports." Private opinions abroad were as disagreeable. Mr. Joseph Adsed of Manchester, in his books "Prisons and Prisoners," elaborately reviews our re-

ports, and speaks of the society "as a farce;" of its action "as a flagrant instance of trickery," as "prison discipline imposture." What was to be found in France? Mr. Sumner read from Moreau Christophe, Inspector General of Prisons there, who has paid, perhaps, more attention to prison discipline than any other Frenchman. He had discussed the whole subject with learning and acuteness; and yet the title of one of his chapters was "*Mensonges* de la Societe a Boston." [*Lies* of the Society in Boston.] From Germany, Mr. Sumner had Vallentrap's "Review of the nineteen Reports" of the Society. That distinguished author did not hesitate to speak of them as *false;* of one table of statistics, on half a page, he said that there were fifteen false figures; and, again, that "a table where half the figures were false could not be of value." From a private letter from a philanthropist for whose reputation he would vouch, he read a similar opinion. The writer had conversed with official persons, and others interested, in Austria, Prussia, Baden, France and Spain, and had often heard regrets that the opinion of the Massachusetts Society was so absolutely formed, that its judgment was closed against any public discussion of the merits of these cases. "The reports were spoken of in a manner by no means flattering to the pride of a Bostonian."

Mr. Sumner concluded by moving the appointment of a committee, with power to examine and review the character of the former printed Reports of the Society, and the course of the Society, to consider whether the same can in any way be amended or varied, or its usefulness in any way be extended, and to make a full report thereon. The resolution was agreed to, and the following committee was appointed:—Bradford Sumner, chairman; Charles Sumner, John Tappan, George S. Hillard, to which the president (Dr. Wayland) was joined.

Law and Phrenology. — The following precious description we find in a phrenological work on Education, by O. S. Fowler: "A lawyer requires the nervous or nervous vital temperament, to give him intensity of feeling and clearness of intellect; large eventuality, to enable him to recall law cases and decisions, and to recollect all the *particulars* and *items* of the case; large comparison, to enable him to *put together* different parts of the law and evidence, to criticise, cross-question, illustrate, and adduce similar decisions and cases; large mirthfulness, to enable him to ridicule and employ the *reductio ad absurdum* in argument; very large combativeness, to make him *love* litigation and foment strife, instead of reconciling the parties; large hope, to make him expect success, and promise it as *certain* to his client; small veneration and marvellousness, and large self-esteem, to make him well-nigh impudent, and enable him to brow-beat and deny; large combativeness, destructiveness and mirthfulness, to make him sarcastic, cutting and biting in his repartees; large acquisitiveness and self-esteem, to make him think *his* services are very valuable, and demand large fees; large secretiveness and small conscientiousness, to enable him to take up on the wrong side without scruple, and wrong his opponent out of his just dues by some quirk of the law, if he possibly can, and to gloss over a bad cause, tell a smooth white or black lie with a face unchanged; large language, to give him a limber tongue; large ideality, to enable him to supply the place of facts by ingenious suppositions, and a decidedly bad, selfish head, adapted to his calling."

Adultery. — In Massachusetts, adultery was formerly punishable capitally. In most, if not all the New England States, it is now punishable by imprisonment in the state prison. In New York an attempt was made last winter to render this offence a crime at law, and we recollect seeing an argument in a newspaper against it, for the reason, among others, that it was a violation of the vested rights of those already married! In England, the attention of parliament has been earnestly called to the subject, and a late writer states, as one of the great benefits of rendering adultery criminally punishable, that "it will render it a vulgar offence, and *this will deter its commission in the higher classes;* whilst it will afford accessible redress to those of the lower classes who suffer from it." A

bill to punish adultery was introduced in the house of lords by Lord Aucland, in 1800, and passed by a vote of 77 to 69. It was lost in the house of commons by a majority of thirty-nine votes. Amongst the Jews, adultery was punishable by death. So, also, by the legislation of Justinian, the offence of the adulterer was made capital, and the adulteress, having been whipped, was imprisoned in a convent; and if her husband did not release her before the expiration of two years, she was compelled to take the vows, and remain there for life. In Athens, the adulterer was liable to a fine, and if, on appeal, the crime was proved, the Thermothetae had the power of delivering him over to the husband, to be punished by him to any extent short of death or maiming. There was a law among the Locrians, which punished adultery by depriving the male offender of sight; and in some nations, even at the present day, the penalty is castration or other mutilation. Notwithstanding all this, the example of the Puritans in Massachusetts, and the present laws in New England, are the subject of much invective in some parts of the country, as peculiarly stringent, unwise and unexampled.

Notch-Pot.

It seemeth that this word *hotch*-pot, is in English a pudding, for in this pudding is not commonly put one thing alone, but one thing with other things put together. — *Littleton*, § 267, 176 a.

Judge Vanderpœl of the superior court, New York, was recently engaged, as we learn from the New York Post, in hearing a case wherein two persons claimed an interesting little girl two years of age. The child was in the custody of its aunt, who claimed to hold her by virtue of a bequest of its mother, confirmed by letters of administration and guardianship, and an apprenticeship indenture granted by the surrogate. The claimant, was the father of the child, who sought to have it restored to his custody. From the testimony it appeared that the father went south, leaving his wife and child behind. During his absence his wife died, leaving the child to its aunt, and on the return of the father, he was met by the indenture. The judge, in deciding the case, said that he considered that a parent's right to his child was paramount to the bequest, and the proceedings of the surrogate. He therefore directed the child to be delivered to the custody of its father. This was undoubtedly according to law and common sense, but we are almost surprised at the decision, inasmuch as the tendency of recent decisions has been to deny the rights of fathers to the custody of their children altogether, wherever it shall please third persons to interfere. Undoubtedly this "aunt" could have proved as clearly as it has been done in some other cases we know of, that the "health and general good" of the child require that it should be left in her custody. This and a few sentimental letters, some tears and many deep-drawn sighs, might have produced a different effect in some parts of the country, and been deemed amply sufficient to defeat the rights which God and nature, to say nothing of the common law, have given to the fathers of children.

One of the most learned lawyers on the English bench at this time is Mr. Justice Wightman, of the King's Bench. When at the bar, he was known for his exclusive devotion to the learning of his profession. His particular department was that of special pleading. He also performed the duties, familiarly known in Westminster Hall, as the attorney general's *devil*, preparing out of court the cases of this distinguished law officer. His interest in his profession rendered him indifferent to politics. It is related of him, that one of his friends once said to him, "Wightman, are you a whig or a tory?" To which the lawyer at once replied, "Sir, I am neither whig nor tory; I am special pleader."

We understand that Joseph Cutler, Esq., of the Boston bar, has in press an edition of the Insolvent Laws of Massachusetts, with notes of all the decisions that have been made upon the subject in this commonwealth. Such a work is much needed, and, from the few pages of the volume which we have been permitted to examine, we should judge that the labor has been performed very acceptably by Mr. Cutler.

The name of Hon. J. T. Morehead, of Kentucky, has been withdrawn from the Western Law Journal, "his health and enjoyments having been such hitherto as entirely to prevent him from any participation in the labors of editorship," and there being no prospect of an immediate change in this respect. Mr. Walker continues the work alone.

It is not uncommon for jurors to elevate their feet on the bars before them while listening to the arguments of counsel. A distinguished attorney-general of Massachusetts caused a cessation of the practice, for one term, at least, in Middlesex county, by coolly asking the court *which end of the jury he was expected to address.*

We have on hand notes of decisions made at the recent term of the supreme judicial court, in Portland, Me., but are obliged to omit a part of them this month for want of room.

We are happy to announce the arrival in this country of Hon. James T. Austin, the late distinguished attorney-general of Massachusetts, who has been spending several years in Europe.

Obituary Notices.

Died.—In St. Louis, Mo., April 22, Edward Cruft, Jr., Esq., Counsellor at Law, aged 34. Mr. Cruft was a graduate of Harvard University, and a native of Boston, in which city he practised law several years prior to his removal to St. Louis. In his new residence he appears to have won the respect of the community, and attained to a highly respectable rank at the bar. In the preface to the Missouri Justice, by Judge Krum, the author states that he "is greatly indebted to the learning and professional skill of Edward Cruft, Jr. Esq., of the St. Louis bar, to whose accurate and critical supervision, these subjects, in their course of preparation, were especially committed." In the circuit court, at St. Louis, J. B. Walker, Esq., in announcing the death of Mr. Cruft, occupied the attention of the court a few moments in an appropriate tribute to the private worth and professional character of the deceased, and moved the court that, as a proper testimonial of respect to his memory, this suggestion be entered upon its records, and that the court be adjourned until the next day at eleven o'clock. Judge Krum responded to the remarks of Mr. Walker, in strong terms of friendship for the deceased, and high respect for his private and professional character, and ordered that the proper testimonial be entered upon the record, and that the court be accordingly adjourned. Immediately after the adjournment of the court, a meeting of the bar was held, and Edward Bates, Esq., was, on motion, called to the chair, and D. N. Hall, Esq., appointed secretary. On motion, a committee, consisting of Messrs. J. B. Walker, Wilson Primm, Judge John M. Krum, Miron Leslie, John F. Darby, and John N. Shipley were appointed to present proper resolutions expressive of the sense of the bar upon the demise of Mr. Cruft.

In Quebec, in May last, the Hon. Judge Kerr, aged 80. He was a native of Leith, the son of a highly respectable merchant there; and having completed his education at the university of Glasgow, he went to London about 1785, and entered at the inner temple. While studying there, and after his admission, he made the acquaintance, and, by his mental acquirements and gentlemanly manners and character, secured the friendship of, several men who afterwards distinguished themselves in the legal profession; among these were Scarlett, afterwards Lord Abinger, and Best, afterwards Lord Wynford, and Baron McLelland of the Irish bench. In 1791, Mr. Kerr, having married, came to try his fortune at the Quebec bar, and returning to England in 1796 to bring out his family, he was captured by a French cruiser and taken to France, but speedily exchanged; and coming back to Quebec, in 1797, received the same year the appointment of judge of the vice admiralty. Continuing to practise at the bar, he was, in 1807, appointed a judge of the king's bench; in 1812 was called by Sir George Prevost to the executive council, and by the Earl of Dalhousie, in 1821, to the legislative council. During the absence of chief justice Sewell, in England, in 1814, 1815, and 1816, and again in 1826-7, Mr. Kerr presided as senior judge in the court of king's bench, and during the latter period as speaker of the legislative council. In 1833 he proceeded to England to meet various charges which had been preferred against him, and was assured by the secretary of state that no answer was required; but on a change of ministry, in 1834, he was removed from his office. Returning to Quebec, in 1835, ruined in fortune, and broken in health by a paralytic affection, he passed the remainder of his life in retirement.

Insolvents in Massachusetts for April.

Name of Insolvent.	Residence.	Occupation.	Name of Master or Judge	Commencement of Proceedings.
Anthony, Jacob,	Northampton,	Shoe Dealer,	Mark Doolittle,	April 8.
Ayer, Lucien,	Boston,	Broker,	Bradford Sumner,	" 1.
Babcock, Abram,	Worcester,	Carpenter,	Chas. W. Hartshorn,	" 17.
Bachelor, John,	North Brookfield	Yeoman,	Chas. W. Hartshorn,	" 14.
Bacon, Marshall,	Roxbury,	Cordage Manufact'r,	S. Leland,	" 6.
Bailey, Jason,	Springfield,	Trader,	E. D. Beach,	" 9.
Baker, Isaiah,	Cambridge,	Trader,	George W. Warren,	" 29.
Barnard, George W.	Auburn,	Yeoman,	Chas. W. Hartshorn,	" 9.
Barstow, Charles W.	Oakham,	Trader,	Chas. W. Hartshorn,	" 28.
Bateman, Horatio,	Boston,	Gentleman,	Bradford Sumner,	" 3.
Beard, Samuel,	Groton,	Husbandman,	Bradford Russell,	" 25.
Bent, John P.	Waltham,	Merchant,	Nathan Brooks,	" 10.

Name of Insolvent.	Residence.	Occupation.	Name of Master or Judge.	Commencement of Proceedings.
Bomer, Francis A.	Wenham,	Housewright,	John G. King,	" 29.
Brown, Charles H.	Taunton,	Laborer,	Horatio Pratt,	" 14.
Brown, William P.	Boston,	Grocer,	Ellis Gray Loring,	" 8.
Burroughs, Abel W.	Watertown,	Trader,	Nathan Brooks,	" 6.
Butler, Edward,	Boston,	Laborer,	Bradford Sumner,	" 3.
Chandler, Bartlett B.	Boston,	Surgeon Dentist,	George S. Hillard,	" 29.
Chapin, Ebenezer P.	Needham,	Carpenter,	David A. Simmons,	" 6.
Chase, Henry,	Boston,	Housewright,	Bradford Sumner,	" 7.
Cole, Daniel,	Uxbridge,	Gentleman,	Henry Chapin,	" 18.
Collins, Solomon L.	Boston,	Carpenter,	Bradford Sumner,	" 10.
Crane, Charles S. C.	Dartmouth,	Trader,	Oliver Prescott,	" 6.
Davis, Charles D.	Boston,	Victualler,	Ellis Gray Loring,	" 23.
Davy, Asaph M.	Boston,	Carpenter,	Bradford Sumner,	" 10.
Dawson, George,	Ipswich,	Shoe Manufacturer,	John G. King,	" 1.
Day, Benjamin,	Lowell,	Stone Cutter,	Nathan Brooks,	" 13.
Dorman, Lathrop,	Worcester,	Moulder,	Isaac Davis,	" 27.
Eaton, William H.	Newburyport	Shoe Manufacturer,	John G. King,	" 3.
Evans, William K.	Taunton,	Machinist,	Horatio Pratt,	" 20.
Ewer, Benjamin F.	Sandwich,	Yeoman,	N. Marston,	" 8.
Field, De Esting S.	Amherst,	Merchant,	Ithaman Conkey,	" 21.
Ford, Elisha,	Boston,	Housewright,	Ellis Gray Loring,	" 3.
Gale, Reuben,	Boston,	Trader,	Bradford Sumner,	" 27.
Gould, Richard T.	Boston,	Baker,	Bradford Sumner,	" 28.
Green, Ebenezer G.	Quincy,	Mariner,	Nathaniel F. Safford,	" 10.
Harlow, David,	Plymouth,	Trader,	William Thomas,	" 3.
Harrington, John H.	Leominster,	Tailor,	Benj. F. Thomas,	" 18.
Hastings, Samuel N.	Boston,	Grocer,	Ellis Gray Loring,	" 8.
Henderson, Frederick A.	Boston,	Trader,	Ellis Gray Loring,	" 3.
Herring, Samuel H.	Roxbury,	Cordage Manufact'r,	S. Leland,	" 16.
Holbrook, Henry I.	Boston,	Merchant,	Ellis Gray Loring,	" 30.
Holbrook, Lewis,	Sutton,	Carpenter,	Isaac Davis,	" 17.
Houghton, Daniel W.	Boston,	Trader,	Bradford Sumner,	" 17.
Howard, Charles,	Springfield,	Paper Maker,	E. D. Beach,	" 3.
Jones, Francis P.	Charlestown,	Trader,	George W. Warren,	" 1.
Jones, Peter,	Boston,	Shipwright,	Bradford Sumner,	" 30.
Judson, Samuel H.	Warren,	Stove Dealer,	Benj. F. Thomas,	" 6.
Kimball, George,	Fitchburg,	Carpenter,	Charles Mason,	" 20.
Lathrop, Wells,	South Hadley	Paper Maker,	E. D. Beach,	" 3.
Lincoln, Thomas,	Saugus,	Stove Dealer,	David Roberts,	" 15.
Lincoln, Francis,	New Bedford,	Trader,	Oliver Prescott,	" 6.
Loring, Judah A.	Braintree,	Mariner,	Aaron Prescott,	" 25.
Mann, William,	Blackstone,	Gentleman,	Henry Chapin,	" 28.
McGuire Patrick,	Pantuckett,	Livery Stabler,	Horatio Pratt,	" 10.
Merriam, John,	Topsfield,	Trader,	John G. King,	" 21.
Morrell, Benjamin I.	Boston,	Housewright,	Ellis Gray Loring,	" 3.
Murray, John,	Taunton,	Laborer,	Horatio Pratt,	" 18.
Mygatt, H. P.	Boston,	Trader,	Bradford Sumner,	" 21.
Newcomb, Paul,	Braintree,	Stone Cutter,	Nathaniel F. Safford,	" 15.
Norton, John H.	New Bedford,	Sail Maker.	Oliver Prescott,	" 22.
Noyes, Cyrus,	Springfield,	Livery Stabler,	E. D. Beach,	" 28.
Patterson, William,	Dorchester,	Cabinet Maker,	Nathaniel F. Safford,	" 16.
Patterson, William,	Boston,	Musician,	Bradford Sumner,	" 22.
Paul, Gilbert,	Taunton,	Laborer,	Horatio Pratt,	" 11.
Peck, Levi,	Winchendon,	Trader,	Benj. F. Thomas,	" 25.
Person, Noah S.	New Bedford,	Trader,	Oliver Prescott,	" 14.
Porter, George W.	Boston,	Trader,	Bradford Sumner,	" 17.
Rich, Joshua G.	Roxbury,	Mason,	S. Leland,	" 3.
Ritson, Robinson,	Taunton,	Paper Manufacturer,	Horatio Pratt,	" 18.
Sargent, Horatio,	Springfield,	Farmer,	Oliver B. Morris,	" 14.
Sawyer, John,	Topsfield,	Blacksmith,	John G. King,	" 18.
Sewell, John,	Framingham,	Provision Dealer,	Bradford Sumner,	" 14.
Shedd, C. F	Boston,	Trader,	Bradford Sumner,	" 3.
Snelling, N. G. 2d,	Boston,	Trader,	Bradford Sumner,	" 17.
Sousman, Isaac J.	Roxbury,	Carriage Painter.	David A. Simmons,	" 23.
Steadman, Francis F.	Springfield,	Trader,	Justice Willard,	" 28.
Stocker. Alfred A.	Boston,	Trader,	Bradford Sumner,	" 4.
Stowe, Joseph A.	Grafton,	Shoemaker,	Isaac Davis,	" 30.
Sumner, Davis,	Boston,	Stone Mason,	Bradford Sumner,	" 8.
Swift, Pelham E.	Rochester,	Wheelwright,	Zachariah Eddy,	" 11.
Tenney, John,	Millbury,	Trader,	Chas. W. Hartshorn,	" 10.
Thomas, Henry B.	Worcester,	Carpenter,	Chas. W. Hartshorn,	" 16.
Tuttle, Edward W.	Boston,	Shipwright,	Bradford Sumner,	" 30.
Walcutt, Freeman,	Watertown,	Carpenter,	Nathan Brooks,	" 4.
Walcutt, Freeman,	Marlboro'	Carpenter,	Nathan Brooks,	" 4.
Ware, Cyrus L.	Boston,	Transportat'n Agent,	Ellis Gray Loring,	" 9.
Westcott, William,	Upton,	Currier,	Henry Chapin,	" 9.
Weston, Henry,	Plymouth,	Housewright,	William Thomas,	" 7.
Woodward, Gurdon,	Leicester,	Yeoman,	Chas. W. Hartshorn,	" 27.
Whitney, Abiezer H.	Boston,	Housewright,	George S. Hillard,	" 20.